that the Georgia law to which he had referred did not apply to the insurance products at issue in this case. Pet. App. D, 25a-26a, 29a. In a lengthy legal analysis described below, the trial court found that the settlement met the requirements for approval under Alabama law and was fair to all class members.

During the fairness hearing, Petitioners sought to examine Gadson. The trial court noted that Gadson was not properly subpoenaed but had previously submitted evidence in an affidavit. Resp. App. D, 74a-75a. Petitioners advised the trial court that they had conducted a recorded interview with Gadson. *Id.* at 75a. The trial court reviewed this evidence. *Id.* The trial court ultimately found that Gadson was an adequate class representative. Pet. App. C, 12a.

D. The Trial Court's Final Order.

On September 29, 2004, the trial court entered its Final Order approving the class settlement and dismissing the case with prejudice. The Final Order defined the class, "pursuant to Rules 23(b)(2) and 23(b)(3) of the Alabama Rules of Civil Procedure," as "all persons (including the named plaintiff) in Alabama or Georgia who at any time in the Class Period, purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company that provided coverage to that individual and/or his or her family. . . ." Pet. App. D, 18a.

The Final Order certified a settlement class pursuant to Ala.R.Civ.P. 23(a) & (b)(3). It also specifically addressed the Petitioners' contentions and denied the objections to the settlement, holding that the settlement was fair and reasonable and met the legal requirements for approval under Alabama law. The Final Order specifically overruled the objection that the settlement was not fair to Georgia residents because Georgia law was stronger (*citing* Ga. Code Ann. § 33-30-12). Pet. App. D, 24a, 26a-27a, 29a. The trial court found that

Georgia class members did not have liability or damages claims superior to those of Alabama class members. *Id.*[4]

The trial court also found that there was no evidence of collusion between Plaintiff's and Defendants' counsel, noting:

> Among the arguments presented by Ms. Askew, the most serious allegation is her contention that there was collusion between the plaintiff and defendants in reaching the Stipulation in this Action. The Court does not take such accusations lightly, but notes that Ms. Askew failed to provide the Court with any actual evidence or valid argument to support her suspicions.

Id. at 30a-31a. The trial court further noted that Petitioners' counsel had filed a new action in Georgia "which asserts claims against common defendants arising out of the same conduct alleged against those defendants in this Action." *Id.* at 21a. The trial court concluded that "counsel's involvement in these other, competing cases explains the impetus behind and real motivation for the objections offered here." *Id.*

The trial court indicated that it had "previously examined the notice provided to the members of the class and concluded that the required notice was the best notice practicable and adequately advised the Settlement Class of this action and the settlement contemplated herein." *Id.* at 31a. Finally, the trial court found that "the settlement here is fair, reasonable and adequate." *Id.* at 33a.

E. Petitioners' Motions For Reconsideration.

The Petitioners brought motions for reconsideration and to alter, amend or vacate the Final Order.[5] In response, the trial

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[4] These arguments were also made by Petitioners' counsel to the Alabama Supreme Court and were unanimously rejected. *See* Pet. App. A, 1a and B, 2a. Petitioners have not articulated how a state court's comparison of the insurance regulations of two states and the evaluation of claims arising under those regulations raises a federal issue.

court conducted another hearing on November 1, 2004, during which the Petitioners requested an opportunity to question Gadson. The trial court offered to order Gadson to testify but cautioned that it would also require the Petitioners' attorney who had interviewed Gadson to testify. Petitioners decided against calling Gadson to testify. Resp. App. D, 75a-77a.

On November 9, 2004, before the trial court had ruled on the Petitioners' motion for reconsideration, Petitioners filed their notice of appeal to the Supreme Court of Alabama. On November 10, 2004, the trial court issued an opinion that overruled Petitioners' motions, upheld its earlier ruling approving the settlement and dismissing the action, and found that the settlement complied with Alabama law. *See* Pet. App. C. This Order found that each of the factors required by Ala.R.Civ.P. 23(a) and (b) (numerosity, commonality, typicality, superiority, and class representative's adequate representation of the class) had been established. *Id.* at 6a-15a. The trial court also found that Petitioners had failed to present any evidence that could even potentially rebut the court's findings. *Id.* at 10a, 11a, 12a.

F. Petitioners' Appeal To The Alabama Supreme Court.

Petitioners' appeal to the Alabama Supreme Court sought decertification of the class on four grounds: (1) that Gadson was an inadequate representative; (2) that Georgia class members were inadequately represented and inadequately compensated under the settlement; (3) that the class notice was

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[5] These motions did not raise the argument, raised for the first time before the Alabama Supreme Court, that the language used to describe the class was amended by the trial court's Final Order. Because this argument was never raised in the trial court, it was waived and could not be raised for the first time on appeal. *See infra* § IV.B. In any event, there has been no showing that the language clarification was material to any issue in the case or to any federal issue.

defective; and (4) that the trial court failed to engage in a rigorous analysis as required by Ala.R.Civ.P. 23. The Alabama Supreme Court heard oral argument and unanimously affirmed the settlement. *See* Pet. App. B, 2a. The Alabama Supreme Court decision was issued without an opinion and affirmed the trial court ruling, referring to Alabama Rule of Appellate Procedure 53(a)(1) and (a)(2)(F), which provides that "[t]he [Alabama] Supreme Court . . . may affirm a judgment or order of a trial court without an opinion if the court determines: (1) [t]hat an opinion in this case would serve no significant precedential purpose; and . . . (2) . . . (*F*) [t]he court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law." Ala.R.App.P. 53(a)(1) and (a)(2)(F).

Petitioners filed a motion for reconsideration, and on October 21, 2005, the Alabama Supreme Court denied this motion. *See* Pet. App. A, 1a. Petitioners timely filed the current Petition for Writ of Certiorari.

III. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION.

This Court lacks jurisdiction to consider the questions presented by Petitioners. With "very rare exceptions," this Court will not review a state court decision unless a federal question has been raised and decided by the state court. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (certiorari improvidently granted where federal due process challenge to state court certification of multistate class action never raised below). Where it is unclear whether a state court has ruled on a federal issue, this Court will assume that the federal question was not decided and will deny certiorari unless the petitioner can demonstrate that the federal question was presented to and ruled upon by the state court. *See Adams*, 520 U.S. at 86; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987). The Court will attribute the state

court's decision to an interpretation of state law, unless a federal basis is apparent in the decision.

A review of the decisions below confirms that neither the Alabama Supreme Court nor the trial court decided any federal questions. Indeed, in their summary of the decisions below, Petitioners do not assert that the Alabama Supreme Court decided the federal due process or full faith and credit questions they now present to this Court. *See* Petition ("Pet.") at 9-29.

As this Court has explained, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969), *quoted in Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 550. Indeed, the record of this case demonstrates that the federal issues on which Petitioners seek review were never addressed or properly raised in the Alabama courts.

The rules of the Alabama Supreme Court require a "Statement of Issues" in briefs filed with that court. Ala.R.App.P. 28(a)(6). Petitioners' Statement of Issues lists a variety of state-law claims but makes no explicit reference to any federal claim. Resp. App. C, 23a-24a; *see Adams*, 520 U.S. at 87 n.1 (*citing* Ala.R.App.P. 28(a)[6] and *Eady v. Stewart Dredging & Const. Co.*, 463 So. 2d 156, 157 (Ala. 1985) (holding that "[f]ailure to comply with A.R.App.P. 28(a)[6] has been held to be a failure to properly present an issue for appellate review")). Indeed, other than a single generic reference to the "Due Process" clause, the issues identified in Petitioners' brief to the Alabama Supreme Court are predicated exclusively on state law, and even the reference to the due process clause does not identify the U.S. Constitution.

Similarly, Petitioners' briefs to the Alabama Supreme Court contain no specific citations to the United States Constitution generally, the Full Faith and Credit Clause, or the Fourteenth Amendment.[6] Moreover, as in *Adams*, Petitioners failed to provide "pertinent quotations of *specific* portions of the record or summary thereof, with *specific* reference to the places in the record where the matter appears" to demonstrate when and how a federal question was raised and considered by the courts below. *See* S.Ct.R. 14(g)(i) (emphasis added). Petitioners' failure to comply with this requirement is evidenced by Petitioners' Appendix, which excludes all briefs to the Alabama Supreme Court and the trial court. *See Adams*, 520 U.S. at 89 n.3.

Petitioners' failure to cite to the record below is explained by the fact that Petitioners never raised the issues now presented in their petition. In their briefs to the Alabama Supreme Court, Petitioners mentioned "due process" only in the context that the requirements of Ala.R.Civ.P. 23 were not met. *See generally* Resp. App. C. Similarly, Petitioners' only reference to the "full faith and credit clause" related to the issue of whether the class requirements under Ala.R.Civ.P. 23 were met.[7] *See generally id.* These references clearly fall short of even the "passing invocations of due process" that this Court has found insufficient to meet the

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[6] Petitioners' table of authorities likewise contains no such citations.

[7] Petitioners did not specify whether this was a reference to the due process requirements and full faith and credit clause of the U.S. Constitution, or to the analogous provisions of the Alabama Constitution. *See e.g., Bowe v. Scott*, 233 U.S. 658 (1914) (finding a general reference to "due process," without more specificity, refers to clause in the state, rather than federal, Constitution). Indeed, Petitioners disavowed the applicability of federal law, explaining that their citations to federal authorities were appropriate only because Alabama's class action rules are "patterned" after Rule 23 of the Federal Rules of Civil Procedure. Resp. App. C, 32a n.5.

"minimal requirement that it must be clear that a federal claim was presented." *Adams*, 520 U.S. at 89 n.3

Petitioners' arguments to the trial court primarily focused on the fact that the requirements under Ala.R.Civ.P. 23 were not met because Georgia statutory law was allegedly superior to Alabama law regarding the claims encompassed in the settlement. Petitioners never raised with the trial court the issues subsumed within their Question Presented No. 1. For example, Petitioners never raised with the trial court their contention that Gadson lacked standing to represent the class, nor did they raise the alleged defect in the class definition based on the trial court's language clarification. Indeed, following the Alabama Supreme Court's unanimous affirmance, Petitioners raised for the first time in their Motion for Rehearing the issue that Gadson did not have standing under Georgia law.[8]

As this Court has observed, "[a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). That "minimum" prerequisite is lacking here. Consequently, the petition should be denied.

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[8] Alabama courts generally will not consider issues raised for the first time on appeal or on a motion for rehearing. *See, e.g., State v. Newberry*, 336 So. 2d 181, 182 (Ala. 1976); *State v. Graf*, 189 So. 2d 912, 913 (Ala. 1966); *Burton v. Burton*, 379 So. 2d 617, 618 (Ala. Civ. App. 1980); *Crews v. Houston City Dept. of Pensions & Sec.*, 358 So. 2d 451, 455 (Ala. Civ. App. 1978), *cert. denied*, 358 So. 2d 456. This Court has also declined to "consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89 n.3; *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549-550.

IV. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT RAISE ANY FEDERAL OR CONSTITUTIONAL ISSUES.

Petitioners contend that the trial court's approval of the settlement violated federal due process rights because the trial court's fact findings regarding the class representative's adequacy, typicality, and standing violated constitutional limits imposed on state courts. Petitioners further argue that the notice afforded to absent class members violated due process requirements. As shown above, these issues were never raised in the Alabama trial court or in the Alabama Supreme Court. Petitioners therefore waived these arguments.

Even if these arguments had not been waived, the approval of the settlement and class notice were reviewed by the trial court under established and uncontroversial principles of law. Petitioners may be disappointed with the outcome, but they do not point to any errors of law which create a federal due process violation.

A. The Trial Court Complied With The Due Process Requirement To Consider The Adequacy And Typicality Of Gadson As A Class Representative.

Petitioners contend that the federal constitutional rights of absent class members were violated because Gadson is an inadequate class representative and failed to assert claims "typical" of the class. However, the trial court made explicit fact findings under Alabama law to support its conclusion that these requirements were met.

The petition does not identify any incorrect proposition of federal law in the trial court's Final Order approving the settlement. Like its federal counterpart, Alabama Rule of Civil Procedure 23 requires the trial court to determine that the class representative "will fairly and adequately protect the interests of the class." Ala.R.Civ.P. 23(a)(4). This adequacy

inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *accord Cheminova Am. Corp. v. Corker*, 779 So. 2d 1175, 1181 (Ala. 2000). The trial court made specific findings in support of its determination that Gadson was an adequate representative and that Rule 23(a)(4)'s requirements were met. *See* Pet. App. C, 12a.

Petitioners contend that unlike the class members, Gadson was not a policy holder. Pet. at 17; *see also id.* at 11, 15, 18, 20.[9] This issue was waived below because it was not raised in the trial court. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Lloyd Noland Hosp. v. Durham*, 906 So. 2d 157, 165 (Ala. 2005). Moreover, even if not waived, this issue would not present a proper subject for this Court's review because the trial court made a fact finding that Gadson was a member of the class and asserted claims that fully encompassed the class claims. Pet. App. C, at 11a. The trial court concluded (and the Alabama Supreme Court confirmed) that the requirements of Ala.R.Civ.P. 23(a)(4) were met. *See id.* at 12a. Alabama Rule 23(a) "inherently mandates that the person bringing the action must be a member of the class he seeks to represent." *Ex Parte Exide Corp.*, 678 So. 2d 773, 777 (Ala. 1996) (*citing Amason v. First State Bank of Lineville*, 369 So. 2d 547, 549 (Ala. 1979)). The petition does not demonstrate

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[9] As shown above, Gadson purchased the insurance policy for her son and paid for the policy. Petitioners identify nothing in federal law that denies states the right to afford standing to a parent who purchases insurance for a child and allegedly overpays. In fact, Alabama law affords such purchasers standing. *See Newson v. Protective Indus. Ins. Co.*, 890 So. 2d 81, 90-91 (Ala. 2004) (relatives who purchased insurance policy but were not insureds had standing); *Nat'l States Ins. Co. v. Jones*, 393 So. 2d 1361, 1363-64 (Ala. 1980); *accord N.C. Mut. Life Ins. v. Holley*, 533 So. 2d 497, 499 (Ala. 1987).

any due process deficiency in these principles of Alabama law.[10]

Petitioners also assert a due process violation because Gadson allegedly did not meet the "typicality" requirements required to serve as a class representative. Like federal law, Ala.R.Civ.P. 23(a)(3) requires the class representative to show that his or her claims and defenses are typical of the claims and defenses of the class. *See Chevanova*, 779 So. 2d at 1180-81 (internal punctuation omitted); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). Again, however, the petition fails to disclose that the trial court made factual findings that Gadson's claims were typical of the class. The trial court found that Gadson's claims arise from the same course of conduct allegedly perpetrated against the class. Pet. App. C, 11a. These fact findings, and the legal standards used to reach them, do not conflict with any identifiable federal law.

Petitioners also contend that a due process violation occurred because Gadson allegedly lacked standing under Georgia law. This argument was waived because it was not raised in the trial court. *Hormel*, 312 U.S. at 556; *Lloyd Noland Hosp.*, 906 So. 2d at 165. Petitioners also failed to properly raise this issue with the Alabama Supreme Court. The issue was first raised after oral argument in a "Petition to Submit a Supplemental Brief" and a Motion for Rehearing, both denied by the Alabama Supreme Court. Consequently, this issue is not properly before the Court. *See Rutherford v. Concord Fire Dist.*, 404 So. 2d 708 (Ala. 1981); *Hanson v.*

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[10] Petitioners also speculate that Gadson might not have received notice of the class and the opportunity to opt out because she purchased the policy for her son. This was not raised in the trial court level, and it was therefore waived. *Hormel*, 312 U.S. at 556; *Lloyd Noland Hosp.*, 906 So. 2d at 165. Further, as shown above, the trial court found that the "best practicable notice" was provided, which comports with both state and federal law.

Denckla, 357 U.S. 235 (1958); *Adams*, 520 U.S. at 89 n.3 ("we have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question").

Moreover, even if Petitioners had not waived the issue of whether Gadson had standing to serve as a class representative for Alabama as well as Georgia residents, a state law determination of standing would not raise a federal or constitutional issue warranting review by this Court. Indeed, Petitioners have not even identified a violation of Georgia law, much less federal law. Petitioners assert that Georgia law "only recognizes a personal representative, (i.e., executor or administrator)," as a proper plaintiff. Pet. at 22. In making this sweeping statement, Petitioners rely only on inapplicable Georgia law that addresses the distribution of life insurance proceeds after the policyholder dies. There is no prohibition under federal, Alabama or Georgia law barring the purchaser of health insurance from asserting a claim that she overpaid.

Finally, Petitioners assert a due process violation based on the alleged inadequacy of class counsel. However, the determination of whether an attorney is competent and adequate to represent a class is a uniquely fact-bound issue that is unsuitable for consideration on certiorari. Here, the trial court made detailed findings that class counsel was competent and had vigorously and diligently pursued the case. Pet. App. D, 34a, 36a. The trial court concluded that, "the Objectors/Interveners have presented no evidence" in support of their argument regarding the inadequacy of class representation. Pet. App. C, 12a.[11]

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[11] Petitioners argue that certiorari is warranted because Gadson did not testify at the fairness hearing. There is no federal requirement mandating the use of live testimony as opposed to affidavits at a settlement fairness hearing. In any event, the trial court offered Petitioners an opportunity to question Gadson, and Petitioners declined. *See* Counterstatement of Case, § II.E, *supra*.

B. The Trial Court Complied With The Due Process Requirement To Consider The Sufficiency Of The Class Notice.

Petitioners complain that a due process violation occurred because the class definition was altered after class notice. This issue was waived because it was not raised in the trial court. *Hormel*, 312 U.S. at 556; *Lloyd Noland Hosp.*, 906 So. 2d at 165.

Even if this issue had not been waived, it would not present a due process issue warranting consideration by this Court. The modification of the class definition was a minor clarification that was presented to and approved by the trial court without objection.

The class conditionally certified in the trial court's Preliminary Order encompassed "all persons and entities (including the named plaintiff) in Alabama or Georgia who, at any time purchased or renewed in Alabama or Georgia a certificate of medical insurance from United Wisconsin Life Insurance Company." Resp. App. A, 2a. Class notice was sent in accordance with this conditional certification. The trial court's Final Order amended the class definition as follows (change in **bold**): "all persons (including the named plaintiff) in Alabama or Georgia who at any time in the Class Period, purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company ***that provided coverage to that individual and/or his or her family***. . . ." Pet. App. D, 18a (emphasis added).

This modification did not materially alter the scope of the class. Indeed, *a fortiori*, not a single absent class member could be bound by the modified language who was not similarly bound by the original language. "Purchasers" of insurance were included in both the conditional approval order and in the final class definition. The clarifying phrase "*that provided coverage to that individual and/or his or her*

family" could only *narrow* the class (*i.e.*, from all insurance purchasers to only those purchasers for their own coverage or for their family members).

Further, under established legal principles, state trial courts may mold and change a class definition. *See First Ala. Bank of Montgomery, N.A. v. Martin*, 381 So. 2d 32, 33-34 (Ala. 1980) ("An order certifying a class is inherently not a final judgment, even regarding the class certified, because Ala. R. Civ. Proc. 23(c) expressly permits the trial judge to revise his original order at any time before passing on the merits of the case"); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (courts may modify the class definition even after certification order is entered); *Monumental Life Ins. Co. v. Nat'l Standard Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) ("[d]istrict courts are permitted to limit or modify class definitions to provide the necessary precision."). A modification to a class definition does not require resending notice unless there is evidence of prejudice to absent class members. *See Bernard v. Gulf Oil Corp.*, 890 F.2d 735, 746 (5th Cir. 1989).

Petitioners have provided no evidence of any prejudice or of any due process violation associated with the modification of the class notice in this case. There is no federal doctrine that prohibits a state court from making such modifications.

Other than the language clarification, the petition does not identify any other constitutional defect with the class notice. Like federal law, Alabama rules require that class notice is "the best notice practicable under the circumstances." Ala.R.Civ.P. 23(c)(2). The trial court made specific findings that the notice met this requirement. Pet. App. D, 19a-20a.

C. The Inclusion Of Georgia Class Members In The Settlement Did Not Violate The Due Process Clause.

The central proposition of the Petition for Certiorari is that the due process clause was violated because Ms. Gadson is not an adequate or typical class representative, and because the class notice was deficient. However, the petition could also be read to attack the inclusion of Georgia residents in the settlement based on the alleged superiority of Georgia law. This issue does not warrant certiorari because it involves the routine application of settled principles of law by a state court.

In *Shutts*, this Court held that a state court can assert jurisdiction over out-of-state class members, provided that such jurisdiction does not violate the constitutional rights of those out-of-state class members. *Shutts*, 472 U.S. 797. To establish a constitutional violation, it must be shown that the law applied to the out-of-state class members "conflicts in [a] material way" with the law that would be applied if the case had been brought in the class members' home state. *Shutts*, 472 U.S. at 816. As the *Shutts* Court explained, "[t]here can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* In addition, "[t]o constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, [this Court's] cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-731 (1988). In *Shutts*, the trial court had failed to "determine whether any difference existed between the laws of Kansas and other states or whether another state's law should be applied." *Shutts*, 472 U.S. at 822 n.8.

Here, the trial court gave "thoroughgoing treatment" to Georgia law as required by *Shutts*. *Id.* at 818. The trial court found that "[i]n assessing the fairness of the settlement with respect to Georgia residents, the Court will evaluate the claims of those individuals under Georgia law. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)." Resp. App. B, 9a. After two full hearings, extensive briefing and testimony from an expert in Georgia regulatory law, the trial court rejected Petitioners' assertion that material differences in Georgia law were relevant to the adequacy of the Settlement. Pet. App. D, 25a-28a. The trial court determined that the Georgia statute relied upon by Petitioners was inapplicable to this case, but that even if that Georgia statute did apply, there is no private right of action under Georgia law that would allow class members to enforce such claims. *Id.* at 28a. The Alabama Supreme Court unanimously affirmed this finding.

Whether or not Petitioners agree with the trial court's interpretation of Georgia law, Petitioners have not shown a due process violation in connection with the fairness of the settlement. Indeed, even if the trial court misconstrued the Georgia insurance statute, that would still not mean that the settlement violated the due process clause or the full faith and credit clause.

As stated above, in *Sun Oil Co.*, this Court held that to constitute a federal due process violation, "it is not enough that a state court misconstrue the law of another State." *Sun Oil Co.*, 486 U.S. at 730-731. Here, Petitioners have not demonstrated that there is any "clearly established" law in Georgia that applies to the *Gadson* litigation and conflicts with Alabama law in such a way as to create a federal due process violation.[12] The rulings of the Alabama courts complied with the precedent established by this Court.

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[12] The trial court in the instant case specifically noted that it was "unable to locate any case law or other administrative opinions that would

V. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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February 23, 2006

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support [Petitioner's] position" that the Georgia statute would lead to a better result for plaintiffs. Pet. App. D, 27a. "If such decision [refuting the forum court's finding] existed, it was incumbent upon defendant to prove it as matter of fact." *Sun Oil Co.*, 486 at 732 n.4.

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

[Filed April 6, 2004]

CIVIL ACTION NO.: CV-02-1601

VIVIAN GADSON,
individually and on behalf of all others similarly situated,
Plaintiff,

v.

UNITED WISCONSIN LIFE INSURANCE COMPANY; AMERICAN MEDICAL SECURITY, INC.; and AMSOUTH BANK, *et al.*,
Defendants.

ORDER: (1) ACCEPTING STIPULATION OF SETTLEMENT AND COMPROMISE PENDING FAIRNESS HEARING; (2) CERTIFYING TEMPORARY SETTLEMENT CLASS; (3) APPROVING CLASS NOTICE; AND (4) SETTING SCHEDULE FOR CONSIDERATION OF PROPOSED SETTLEMENT AT FAIRNESS HEARING

The parties having made application, pursuant to Rule 23(e) of the Alabama Rules of Civil Procedure, for an Order implementing the settlement of all claims in this action and procedures for the disposition of the action in accordance with the parties' Stipulation of Settlement and Compromise dated March 10, 2004 (the "Stipulation"), which, together with the Exhibits annexed thereto, sets forth the terms and conditions for such settlement and further proceedings relating thereto and for entry of an Order of Final Approval and Judgment dismissing all claims of the Settlement Class, subject to the terms and conditions set forth therein; and the Court having read and considered the Stipulation and the

Exhibits annexed thereto; and all parties having consented to the entry of this Order, it is hereby ORDERED:

1. Pending the Settlement Fairness Hearing, as defined in paragraph 3 below, this Court hereby temporarily certifies, pursuant to Alabama Rules of Civil Procedure 23(a), 23(b)(2) and 23(b)(3), and for settlement purposes only, a Settlement Class consisting of all persons and entities (including the named plaintiff) in Alabama or Georgia who, at any time purchased or renewed in Alabama or Georgia a certificate of medical insurance from United Wisconsin Life Insurance Company. Specifically excluded from the class are: (a) any holders of certificates of insurance whose insurance coverage through United Wisconsin Life Insurance Company at all times has been issued solely as small employer group coverage or under any other employer sponsored group health plan; (b) persons presently in a bankruptcy proceeding; (c) persons that have pending against one or more of the named defendants on the date of the Court's certification order any individual action wherein recovery sought is based in whole or in part on the type of claims asserted in this Action; (d) persons who, as to a particular defendant, have previously obtained a judgment or settled any claims against that same defendant concerning the type claims asserted herein or have previously executed releases, releasing any such claims against the same defendant; (e) persons whose insurance coverage through any defendant at all times has been issued solely through a policy of insurance that is part of an employee welfare benefit plan, pension plan or any similar type plan that is governed by the ERISA statutes; and (f) persons currently serving as a judge or justice of any federal court in Alabama or Georgia (the "Settlement Class").

2. Pending the Settlement Fairness Hearing, as defined in paragraph 3 below, and further proceedings pursuant hereto, this Court preliminarily approves the settlement of the claims of the Settlement Class as fair, reasonable and adequate.

3. A hearing (the "Settlement Fairness Hearing") shall be held on September 8, 2004 [at least one hundred fifty (150) days from the date of this order] at 9:00 a.m. at the Montgomery County Courthouse, Montgomery, Alabama, to determine whether: (i) the Settlement Class should be certified pursuant to Ala. R. Civ. P. 23(a), (b)(2) and (b)(3); (ii) the proposed settlement, as set forth in the Stipulation on the terms and subject to the conditions provided for therein, is fair, reasonable and adequate and should be approved by the Court; (iii) Class Counsel have adequately represented the interests of Settlement Class Members; and (iv) an Order of Final Approval and Judgment in the form annexed to the Stipulation should be entered. The Court may adjourn the Settlement Fairness Hearing on the hearing date without further notice to members of the Settlement Class.

4. The Court approves, in form and content, the form of "Notice of Class Action and Proposed Settlement" (the "Settlement Notice—Direct Mail Notice") attached as Exhibit B to the Stipulation and the form of "Publication Notice" attached as Exhibit C to the Stipulation, and finds that the mailing and publication of such notices in the manner and form set forth in this Order adequately meet the requirements of Rule 23 of the Alabama Rules of Civil Procedure and due process and constitute the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

5. (a) Within ninety (90) days of the date of this Order (i) a copy of the Settlement Notice substantially in the form annexed as Exhibit B to the Stipulation, shall be mailed by first class mail to all persons who, after reasonable review of company records, having been identified by defendants as possible members of the Settlement Class, at the most recent addresses reflected in such company records; and (ii) Summary Notice in the form annexed as Exhibit C to the Stipulation shall be published as provided in the Stipulation.

Said publication notice shall allow any class member not receiving mail notice to provide a correct address in order to be included in subsequent mailings. The Court finds the foregoing notice is the best notice practicable and adequately advises the Settlement Class of this Action and the settlement contemplated herein.

(b) On or before [seven (7) days prior to the hearing date] September 1, 2004, proof, by affidavit, of such mailing and publication of notice shall be filed by defendants with the Court; and

(c) On or before [seven (7) days prior to the hearing date] September 1, 2004, the parties will submit to the Court any papers seeking approval of the proposed Settlement set forth in the Stipulation. Plaintiffs' counsel shall also submit any request for approval of attorney's fees and expenses on or before September 1, 2004.

6. As provided in the form of notice attached to the Stipulation, each Class Member shall have until August 19, 2004 [twenty (20) days prior to the schedule date of the Settlement Fairness Hearing] to opt out of the class. Each Class Member not electing to opt-out of the class shall be deemed a "member of the Settlement Class. Each class member seeking to opt-out of the class must properly complete the Exclusion Request Form as attached to Exhibit B to the Stipulation and timely mail said form to comply with the deadline set forth therein. More specifically, the Exclusion Request Form must contain the original signatures of the class member (not the signature of a representative) and the class member's address, social security number, group number, and be received by the Settlement Administrator by the date noted on the Form, not merely postmarked by the deadline date. Any member of the Settlement Class may appear at the Settlement Fairness Hearing, either by written papers (as described below) and/or in person or by counsel of such person's choice (and at such person's own expense), and show cause (i) why the Settle-

ment Class should not be certified, (ii) why the Settlement should not be approved, (iii) why Class Counsel have not adequately represented the interests of Settlement Class Members, or (iv) to be heard on any other objections such Settlement Class Member may have with respect to any aspect of the Settlement and/or Class Counsel's application for an award of attorneys' fees; *provided, however*, that unless the Court shall otherwise direct, no person or counsel shall be heard, and no written objection, memorandum or other paper shall be received or considered by the Court, unless such person or counsel shall file with the Clerk of the Court no later than August 19, 2004 [twenty (20) days prior to the schedule date of the Settlement Fairness Hearing], showing service on counsel of record, in the manner designated in the Notice, a copy of such written objections, as well as any pleadings, memoranda or other papers and information in support thereof, and stating the bases for such objection, and notice as to whether such person or counsel intends to appear at the Hearing. Any member of the Settlement Class who does not object in the manner so provided shall be deemed to have waived such objection to the fairness, reasonableness or adequacy of the proposed settlement as set forth in the Stipulation.

7. Notwithstanding anything in the Stipulation of Settlement and Compromise to the contrary, defendants shall mail claim forms, premium credit vouchers as described in paragraph IIB(1)(b) of the Stipulation of Settlement and Compromise; and the disclosures described in paragraph IIB(1)(d)(ii) and (iii) of the Stipulation of Settlement and Compromise within sixty (60) days of the Effective Date as defined in paragraph IG of the Stipulation of Settlement and Compromise.

8. Notwithstanding anything to the contrary in the Stipulation of Settlement and Compromise, any Class Member, in order to be eligible to receive a refund, must complete a claim

form setting forth their name, address, social security number and group number, and the Class Member shall have foregone any opportunity to opt-out of the class. No claim form shall be accepted unless received by defendant or its designee within one hundred twenty (120) days of the Effective Date as defined in paragraph IG in the Stipulation of Settlement and Compromise.

9. The failure of a Class Member to claim or obtain any settlement consideration here made available shall not effect the release of such Class Member's claims and the settlement shall retain its full, binding effect. As to any Class Member who otherwise would be entitled to settlement consideration and who for any reason fails to mail their claim for settlement consideration with one hundred twenty (120) days of the Effective Date as defined in paragraph IG of the Stipulation of Settlement and Compromise, all rights of such Class Member to consideration in this action shall lapse and be forfeited. Defendants shall not be required to remit any additional consideration to claiming Class Members on account of the forfeiture by any Class Member.

10. Notwithstanding anything to the contrary in the Stipulation of Settlement and Compromise, defendants or their designee shall complete processing of all claims within one hundred eighty (180) days of the Effective Date as defined in paragraph IG of the Stipulation of Settlement and Compromise and shall provide Class Counsel with a final accounting of all claims, approved and unapproved, within two hundred ten (210) days of the Effective Date.

11. Pending the Settlement Fairness Hearing, all proceedings in connection with prosecution of this Action are hereby stayed, except those proceedings necessary or appropriate in connection with effectuating this Order and the Settlement, and all Settlement Class Members are barred and enjoined from commencing or prosecuting, either directly, representatively or in any other capacity, any of the "Released

Claims" against the defendants or the Released Parties as those terms are defined in the Stipulation.

12. In the event the Stipulation is not approved by the Court or the Order of Final Approval and Judgment approving the settlement provided for therein is not entered or does not become final pursuant to the terms of the Stipulation or if for any reason the Settlement is terminated before the Effective Date or the Effective Date otherwise does not occur, then such settlement shall become null and void and of no further force and effect (except as otherwise expressly provided therein) and shall not be used or referred to for any purpose whatsoever in any action or proceeding except as otherwise set forth in the Stipulation. In such event, such Stipulation and all negotiations, orders and proceedings relating thereto shall be withdrawn without prejudice as to the rights, claims or defenses of any and all parties thereto, all of whom shall be restored to their respective positions as of the date of the Stipulation.

13. The Court hereby reserves (a) the right to approve the Settlement with such modifications as may be agreed to by counsel for the parties thereto consistent with the terms thereof, without further notice to the Settlement Class; (b) the right to adjourn and to reschedule the Settlement Fairness Hearing, without further notice to the Settlement Class other than by oral announcement thereof at the time and place for which such hearing is hereby being scheduled or any adjourned date thereof; and (c) the right to entertain during the Settlement Fairness Hearing an application for the award of reasonable attorneys' fees and reimbursement of costs and expenses for Class Counsel, subject to the limitations set forth in the Settlement.

14. The Court recognizes that the parties have entered the Stipulation of Settlement and Compromise for settlement purposes only, and neither the fact of, nor any provision contained in the Stipulation of Settlement and Compromise

nor any action taken under the Stipulation of Settlement and Compromise shall constitute, be construed as, or be admissible in evidence as, any admission of the validity of any claim or any fact alleged by plaintiff in this Action or in any other pending or subsequently filed action or of any wrongdoing, fault, violation of law, or liability of any kind on the part of defendants, or admission by defendants of any claim or allegation made in this Action or in any action, or admission by any of the plaintiffs, members of the Settlement Class, or plaintiff's Class Counsel, of the validity of any fact or defense asserted against them in this Action or any action. The Stipulation of Settlement and Compromise shall, however, be admissible in any action or proceeding to enforce the terms of the Stipulation of Settlement and Compromise.

15. The Stipulation of Settlement and Compromise is without prejudice to the rights of defendants to (a) oppose class certification in this Action should the Stipulation of Settlement and Compromise not be approved by the Court or implemented for any reason; (b) oppose certification in any other proposed or certified class action; or (c) use certification of the Settlement Class to oppose certification of any other proposed class arising out of or related to the claims asserted in this Action.

DONE this 6th day of April, 2004.

/s/ Johnny Hardwick
JOHNNY HARDWICK
Circuit Judge

APPENDIX B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

[Filed June 29, 2004]

CIVIL ACTION NO.: CV-02-1601

VIVIAN GADSON,
individually and on behalf of all others similarly situated,
Plaintiffs,

v.

UNITED WISCONSIN LIFE INSURANCE COMPANY; AMERICAN MEDICAL SECURITY, INC.; and AMSOUTH BANK, *et al.*,
Defendants.

ORDER

Upon motion of the parties and after a hearing and a review of the June 14, 2004 order from the Superior Court of Cobb County Georgia in the case styled *Stephen Parker, et al. v. American Medical Security, Inc, et al.*, the Court finds that clarification of its April 6, 2004 Order is necessary. Therefore, the Court orders, judges and decrees as follows:

1) As the April 6, 2004 order states, the Court will conduct a fairness hearing on September 8, 2004, in order to determine whether, among other things, the proposed settlement in this case is fair, reasonable and adequate and should be approved by the Court. In assessing the fairness of the settlement with respect to Georgia residents, the Court will evaluate the claims of those individuals under Georgia law. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Court does not interpret the choice of law provision contained in the stipulation between the parties to require the Court to disregard Georgia law in assessing the claims of Georgia

residents. In any event, the Court would not, and could not, be bound by any such agreement between the parties.

2) In the April 6, 2004 Order, the Court excluded from the definition of the Settlement Class any "persons that have pending against one or more of the named defendants on the date of the court's certification order any individual action wherein recovery sought is based in whole or in part on the type of claim asserted in this action." This exclusion applies to all individuals who have brought their own lawsuits against any of the defendants, regardless of whether or not those individuals are attempting to represent a class. The Court is informed that individuals Stephen Parker, Anne Parker, Julie Cox, William Rolader and Sharon Rolader filed a lawsuit on March 15, 2004 against American Medical Security, Inc. and United Wisconsin Life Insurance Company in Cobb County, Georgia on behalf of themselves and a putative class of Georgia residents. The Court is further informed that the putative class has not been certified, thus only the individual claims of the named plaintiffs were pending at the time of the Court's preliminary certification of the Settlement Class.

3) As a result of their lawsuit, which was pending at the time of the preliminary certification of the Settlement Class, Stephen Parker, Anne Parker, Julie Cox, William Rolader, and Sharon Rolader are not members of the class as defined by the Court.

4) The terms of the Court's April 6, 2004 Order remain in effect and the parties remain bound by those terms.

Done this the 28th day of June, 2004.

/s/ Johnny Hardwick
JOHNNY HARDWICK
Circuit Court Judge

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

CASE NO. 1040260

ON APPEAL FROM THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

ANGELA KING, VALERIE ASKEW, CHARLES J. KAHN,
JANA HUTCHINSON, and SHARON HENDERSON,
Appellants/Interveners,

v.

VIVIAN GADSON, UNITED WISCONSIN LIFE INSURANCE
COMPANY, AMERICAN MEDICAL SECURITY, *et al.*
Appellees/Class Action Proponents.

CV: 02-1601

BRIEF OF APPELLATE/INTERVENERS IN OPPOSITION
OF CLASS ACTION CERTIFICATION

ORAL ARGUMENT REQUESTED

L. ANDREW HOLLIS, JR., Esq.,
STEVE W. COUCH, Esq.
Attorney for Appellants/
Interveners Angela King, Valerie
Askew, Charles J. Kahn, Jana
Hutchinson and Sharon Henderson

OF COUNSEL:
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Financial Center
505 North 20th Street, Suite 1750
Birmingham, Alabama 35203

STATEMENT REGARDING ORAL ARGUMENT

Appellant/Interveners, Angela King, Valerie Askew, Charles J. Kahn, Jana Hutchinson and Sharon Henderson request oral argument. This is a class action lawsuit affecting more than 30,000 persons over a two state area with respect to their health insurance. The pertinent facts are many and relatively complex, and while most of the legal principals are well established, because this case involves an appeal of a settlement class, Appellant/Interveners feel that the Court may benefit from a factual presentation that can be made with oral argument. Appellant/Interveners submit that if the legal principles citied herein are applied to the facts, then it is evident that this class action should never have been certified.

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STATEMENT OF JURISDICTION

The Supreme Court of Alabama has original jurisdiction in this case pursuant to Alabama Code § 12-2-7 (1975), §6-5-641, and § 6-5-642. In compliance with Ala. Code § 6-5-642,[1] Appellants/Interveners filed this appeal in a timely manner on November 9, 2004. [C. 1396].

On April 6, 2004, the Trial Court preliminarily approved and conditionally certified this class action lawsuit for settlement purposes between Vivian Gadson and United Wisconsin Life Insurance Company, American Medical Security, Inc., Prescription for Good Health Trust and Amsouth Bank. [C. 390].[2] The class consisted of all persons and entities . . . in Alabama or Georgia who, at any time purchased or renewed in Alabama or Georgia a certificate of medical insurance from United Wisconsin Life Insurance Company. [C. 464-465]. The Final Order and Judgment approving the class action settlement was issued on September 29, 2004. [C. 1032-1075]. On October 6, 2004, Interveners filed their motion to reconsider. [C. 1175]. On October 26, 2004, Interveners filed their motion to alter, amend, or vacate the Trial Court's order on certification of this class action. [C. 1305]. On November 1, 2004, the Trial Court held its hearing on Intervener's motions [R. 3-39, Volume 9 of 9]. On November 9, 2004, Interveners filed their notice of Appeal with the Circuit Court of Montgomery County, Alabama, and to the Supreme Court of Alabama. [C. 1396]. On November 10, 2004, the Trial Court denied the Interveners' motions and other requested relief, and, without written request or addi-

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[1] Ala. Code § 6-5-642 (1975) mandates that an appeal of a court's order certifying a class is appealable to this Court within forty-two (42) days of the order.

[2] While the Order does not define the parties, it refers back to the Stipulation of Settlement dated March 10, 2004. [C. 464]. The "Stipulation" is located at [C. 390] and describes the parties as stated.

tional evidence, entered an amended Order on certification. [C. 1382- 1395].

STATEMENT OF THE CASE

This is a case involving the marketing of comprehensive major medical health insurance plans. [C. 104, 105A]. While these plans were marketed as "group" coverage, the Defendants' renewal rating practices revealed that the Defendants considered individual health factors in calculating an insured's renewal premium rather than considering the claims experience and health factors of the entire "group" of which each certificate holder was a member. [C. 36]. This practice resulted in highly inflated premiums being placed upon insureds, especially those who were suffering from serious illnesses, which insureds had to pay to keep their coverage in force. [C. 35].

On June 11, 2002, Plaintiff Vivian Gadson filed her initial Complaint in the Circuit Court of Montgomery County, Alabama. [C.1]. Ms. Gadson brought this claim in her individual capacity against Defendants American Medical Security, Inc., United Wisconsin Life Insurance Company, Amsouth Bank, and Gerry Reynolds, alleging fraudulent representation, fraudulent suppression, wanton conduct including the failure to properly hire, train, and supervise agent Reynolds, unjust enrichment, unfair business practices, and conspiracy. [C. 1-11]. On July 9, 2002, Plaintiff amended her complaint to include class allegations wherein Ms. Gadson sought to represent a class of persons consisting of Alabama residents on similar common law theories as alleged in her original lawsuit. [C. 12]. Two days later on July 11, 2002, Ms. Gadson amended her complaint a second time to allege similar common law claims on behalf of a nationwide class of persons. [C. 30]. On October 15, 2002, Ms. Gadson filed the third amendment to her complaint to add claims for punitive damages. [C. 51-52]. On March 3, 2003, Ms. Gadson filed her fourth amendment to her complaint adding claims on

behalf of a nationwide group of persons who had participated in the Prescription for Good Health Trust that was administered by Defendants. [C. 305]. On March 11, 2004, Ms. Gadson and the Defendants submitted a Stipulation of Settlement and Compromise. [C. 390]. On April 6, 2004, without conducting any evidentiary hearing, the Trial Court certified a class of persons consisting of Alabama and Georgia residents only and set a fairness hearing to take place on September 8, 2004. [C. 464-471].

On May 17, 2004, Interveners Jana Hutchinson and Sharon Henderson made their application to intervene and requested emergent relief. [C. 472]. On August 19, 2004, Angela King and Valerie Askew intervened into this case. [C. 550-557]. On September 7, 2004, pursuant to the Notice to the purported class, Charles J. ("Jack") Kahn intervened. [C. 982]. On August 19, 2004, Interveners submitted their objections to the certification of this case as a class action, arguing, among other issues, (1) that the class should not be certified, (2) the Notice was defective, (3) that the settlement was not "fair, adequate and reasonable," and (4) that the Plaintiff was not an adequate representative for the putative class of persons affected by the settlement. [C. 558-618].

Prior to the "Fairness" hearing, the proponents of the settlement filed their respective briefs and affidavits from the attorneys in support of the certification and settlement of this class action. The documents submitted by the proponents of this class action contained no "expert" witness testimony, and were largely comprised of affidavits submitted from the claims administrator, various class counsel, and the purported class representative. [C. 632, 751].

A "Fairness" Hearing was held oy the Trial Court on September 8, 2004. Neither the Class Plaintiff nor Defendants called any expert witness or fact witness, including the class representative. Counsel for Interveners called the class representative to testify. [R. 115, Volume 8]. Despite serving her

attorneys with a subpoena in Vivian Gadson's name, Ms. Gadson did not appear at her own hearing. [C. 945]. Interveners then called an expert witness who submitted both an affidavit and testified in opposition to the settlement. [R. 129, Volume 8, C. 594-618]. On September 29, 2004, the Trial Court entered the Final Order and Judgment approving the Class Action Settlement. This Order was prepared by counsel representing the class Plaintiff and class Defendants. Interveners filed a Motion to Reconsider on October 6, 2004, and a Motion to Alter, Amend, or Vacate on October 26, 2004, and again served Vivian Gadson with subpoenas to appear at the hearing. [C. 946-949]. Vivian Gadson again failed to appear at the hearing. The Trial Court denied Interveners' Motions on November 10, 2004 and, without any request to do so, amended its Order to attempt to comply with Ala. Code. § 6-5-641 [C. 1382][3].

Appellants/Interveners filed this appeal on November 9, 2004. [C. 1396].

STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in certifying Vivian Gadson as class representative where there are serious substantive concerns that Ms. Gadson had no standing to file this case and her claims are not typical of or common to the claims of the class pursuant to ARCP 23(a)(3), and serious procedural concerns that Ms. Gadson's unwillingness to represent the class led to the inability of the Trial Court judge

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[3] By addressing the substantive portions of the Trial Court's Final Order, Appellants are not implying that they have no objections to the Trial Court's Order of November 10, 2004. In fact, Appellants maintain that, pursuant to Ala. Code § 6-5-641, after the Notice of Appeal was submitted in this case on November 9, 2004, that the Trial Court no longer had jurisdiction to enter its Amended Order as the case was stayed immediately upon the filing of the Notice of Appeal and that therefore, the Trial Court's Amended Order of November 10, 2004 should not be considered by this Court. *See infra*. at p.62.

to properly conduct a rigorous Rule 23 analysis, both of which exclude Ms. Gadson from being certified as an adequate class representative.

2. Whether the Settlement Agreement can meet the requirements of typicality, commonality, and adequate representation necessary for final approval when the negotiations excluded every member of the Georgia insureds, Georgia's laws create claims that are different from and fundamentally stronger than those owned and asserted by the Alabama Plaintiffs, the Georgia class members did not have sufficient contacts or relationships with Alabama to satisfy Rule 23's superiority requirement, and the Settlement Agreement violates the reasonable expectations of Georgia consumers to have a contract executed in Georgia under Georgia's laws adjudicated under Georgia's laws.

3. Whether the Settlement Agreement contains the fairness, adequacy, and reasonableness necessary to bind the classes where it unfairly and unconstitutionally restrains class members' rights to choose their own legal counsel, the waiver and forfeiture provisions are unreasonable, the substantive money award is inadequate and unfair, it contains no meaningful equitable relief or punitive damages for fraud, it violates Georgia law, and the Class Action Notice is woefully inadequate and violates the class members' right to Due Process.

4. Whether the Trial Court erred when it certified this Class Action lawsuit without conducting a "rigorous analysis" pursuant to Alabama law and Ala. Code § 6-5-641.

STATEMENT OF FACTS

This is a case involving the marketing of comprehensive major medical health insurance plans known as "MedOne" plans. This insurance product was sold and marketed as "group" health insurance. MedOne coverage is underwritten by United Wisconsin Life Insurance Company ("UWLIC").

[C. 108]. American Medical Security, Inc., ("AMS") provides administrative services for UWLIC which allows AMS to market, underwrite, bill, collect, pay claims, and perform other services for the AB 2000 policy. [C. 108]. UWLIC and AMS sold their "group" health insurance through a discretionary trust with AmSouth Bank serving as the trustee. [C. 101, 105] The name of the discretionary trust was the "Prescription for Good Health Trust". [Id.]. As trustee, AmSouth Bank held the master policy of insurance through which certificates of insurance were issued to the "employee/certificate-holder" that was covered by the health benefits made the basis of each certificate. [C. 105]. The certificate holder was also the person who applied for the insurance coverage. [C. 105, 118] Each certificate of insurance listed an "employer" who was consistently identified as the same person that was listed as the "employee/certificate holder" on each respective certificate. [C. 105, and all others]. The persons who were insured under each respective certificate were (i) the certificate holder and (ii) any dependent that was eligible for coverage. [C. 118A].

Once an insured person received a certificate of insurance, they were a covered person under the plan. At each renewal period (one calendar year from issuance), the certificate holder would receive a premium renewal notice reflecting the premium amount that must be paid in order to keep the coverage in force. While these plans were marketed as "group" coverage, the Defendants' renewal rating practices revealed that the Defendants considered individual factors such as a certificate holder's/insured's claims experience and health status in calculating that insured's renewal premium, rather than considering the claims experience of the entire "group" of which each certificate holder was a member. [C. 36] The premium increase assigned to any given certificate holder depended upon the malady suffered by that individual insured person. This practice of "tier rating" led to exorbitant premium increases to insureds that were forced to pay these

charges in order to keep their health insurance in force. [C. 35]

On June 11, 2002, Plaintiff Vivian Gadson filed her initial complaint in the Circuit Court of Montgomery County, Alabama. [C. 1]. Ms. Gadson brought this claim in her individual capacity against Defendants American Medical Security, Inc., United Wisconsin Life Insurance Company, Amsouth Bank, and Gerry Reynolds, alleging fraudulent representation, fraudulent suppression, wanton conduct including the failure to properly hire, train, and supervise agent Reynolds, unjust enrichment, unfair business practices, and conspiracy. [C. 1-11].

On July 9, 2002, Plaintiff amended her complaint to include class allegations wherein Ms. Gadson sought to represent a class of persons consisting of Alabama residents on similar common law theories as those alleged in her original lawsuit. [C. 12]. Plaintiff submitted in her first amended complaint that there were "questions of law or fact common to the class, including . . . whether the Defendants were engaged in 'Tier' underwriting and/or whether Defendants engaged in re-underwriting based upon an insured's health and claims history." [C. 15]. Two days later, on July 11, 2002, Ms. Gadson amended her complaint a second time to allege a nationwide class action on behalf of all residents of the United States of America. [C. 30]. In addition to now representing a nationwide class of persons, Ms. Gadson also limited the recovery of each proposed class member to less than $75,000 and decided to not pursue any recovery of punitive damages. [C. 29].

On October 15, 2002, Ms. Gadson filed the third amendment to her complaint to add claims for punitive damages. [C. 51-52]. Like her other complaints, Plaintiff alleged that her claims as class representative were "typical of those of the

class members in that she was subjected to the same unlawful treatment and Plaintiff suffered the same type of harm as suffered by other member of the class." [C. 55].

On March 3, 2003, Ms. Gadson filed her fourth amendment to her complaint adding claims on behalf of a nationwide group of persons who had participated in the Prescription for Good Health trust that was administered by Defendants. [C. 305].

Throughout the original complaint and all four amendments that followed, Ms. Gadson alleged that she was an insured under the AB 2000 policy and that her health and claim history were used to determine the amount of premium charged at renewal. Plaintiff filed her action on a MedOne policy wherein she alleged that her insurance coverage was provided under master policy AB 2000, Client No. 2400-006178. [C. 2-3]. Plaintiff further alleged that the Defendants were underwriting her policy on an annual basis "based upon her health and claim history and that Plaintiff's health and claim history were the main factors used to determine the amount of premium charged . . . ." [C. 3].

On September 27, 2002, Defendants filed a Motion to Dismiss Ms. Gadson's case, because, among other reasons, Ms. Gadson was never sold a policy of insurance by the Defendants. [C. 46-47]. The Certificate of Insurance issued in the instant case was actually issued to Jevon Gadson, Ms. Gadson's son.[4] [C. 105]. Jevon Gadson, not Vivian Gadson, was listed as the certificate holder or covered person under the Certificate of Group Insurance upon which Vivian Gadson based her individual claims and allegations that her claims were typical to those of the class. [C. 217, 223, 55]. Neither

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[4] There is no evidence in the record to reflect that Jevon Gadson is a minor or otherwise incompetent. *See infra* p. 21. In fact, upon information, Jevon Gadson's date of birth is May 1, 1976 which would make him twenty-eight years old as of the date of this submission.

the Certificate of Group Insurance nor the Master Policy Certification submitted by AMS ever mention Vivian Gadson as an "employer," "employee," "certificate holder," or an "insured" under the policy. [C. 105, 99].

On March 11, 2004, Ms. Gadson and AMS submitted a Stipulation of Settlement and Compromise to the Trial Court. [C. 390]. On April 6, 2004, the Trial Court accepted the Stipulation of Settlement and set a Fairness Hearing to take place on September 8, 2004. [C. 464-471]. Without conducting any evidentiary hearing, the Trial Court on April 6, 2004, preliminarily certified this class action as consisting of "all persons and entities . . . in Alabama or Georgia who, at any time purchased or renewed in Alabama or Georgia a certificate of medical insurance from United Wisconsin Life Insurance Company." [C. 464-465]. Pursuant to the April 6, 2004, Order from the Trial Court, Notice was sent to the members of the purported class containing this same class description. [C. Brown Envelope at tabs 5 & 6].

Prior to the "Fairness" Hearing on May 17, 2004, Interveners Jana Hutchinson and Sharon Henderson made their application to intervene. [C. 472]. On August 19, 2004, Angela King and Valerie Askew intervened into this case and also propounded discovery upon the existing parties to the lawsuit so that the Interveners would be able to meaningfully participate at the Fairness Hearing, including interrogatories and requests for production directed toward the substantive proposed settlement that was being proposed by the existing parties. [C. 533-549]. Additionally, Interveners also propounded notices of deposition for the purported class representative, Vivian Gadson, and counsel of record. [C. 550-557]. On September 7, 2004, pursuant to the Stipulation of Settlement and the notice to the purported class of persons affected by this case, Charles J. ("Jack") Kahn intervened. [C. 982]. On August 19, 2004, Interveners submitted their objections to the certification of this case as a class action

arguing that the class should not be certified, the Notice was defective, that the settlement was not "fair, adequate and reasonable," that the settlement terms incorporated "relief" that stood in violation of Georgia law, and that the named class representative was not an adequate representative for the putative class of persons affected by the settlement. [C. 558-618].

The Interveners provided the Trial Court an affidavit from Tim Ryles, the former Insurance Commissioner for the State of Georgia and the listed expert witness for the class Plaintiff. [C. 594-618, R. 129 (Vol. 8)]. Likewise, Interveners supplemented the materials submitted at the Fairness Hearing with an Order from the Superior Court of Cobb County, Georgia, wherein durational rating was found to violate Georgia law. [C. 1236]. Interveners also provided the Trial Court with the Preliminary Order on Certification for another class pending in Florida against these same Defendants styled ***Addison v. United Wisconsin Life Insurance Company, et al.*** in which questions of liability went to trial and a ruling was entered against the Defendants. [C. 1308]. Interveners brought to the Court's attention the great disparity in the relief provided in the ***Addison*** class and the relief being proposed in the instant class action. [C. 1308]

After the "Fairness" Hearing of September 8, 2004, counsel for the proponents of this class action and counsel for interveners/objectors were each asked to prepare proposed orders for the Trial Court. [R. 183, Volume 8]. On September 29, 2004, the Trial Court entered its Final Order (prepared by the class proponents) approving the class action settlement and dismissing the case with prejudice. [C. 1032-1075]. The Final Order, however, certified a ***very different*** class than was initially certified by the Trial Court and that was described in the Notice sent to prospective class members. In its Final Order, the Trial Court certified a class of persons consisting of "all persons (including the named plaintiff) in Alabama or

Georgia who at any time . . . purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company ***that provided coverage to that individual and/or his or her family . . . .***" [C. 1069] [emphasis added].

On October 6, 2004, Interveners filed a Motion to Reconsider, and on October 26, 2004, filed a Motion to Alter, Amend, or Vacate. [C. 1175, 1305]. In compliance with Ala. Code § 6-5-642, Appellants/Interveners filed this appeal on November 9, 2004. [C. 1396].

On November 10, 2004 (the day after Interveners filed their Notice of Appeal in this case, describing, among other things, that one of the issues on appeal was the Trial Court's failure to adhere to a rigorous analysis under Ala. Code § 6-5-641 [C. 1399]), the Trial Court, "without request" from any of the parties, entered an Order denying the Interveners' Motions and also memorializing an attempt to comply with the prescriptions of Ala. Code § 6-5-641. [C. 1382-1395].

STATEMENT OF THE STANDARD OF REVIEW

Appellate courts should review a trial court's ruling on a Class Certification Order utilizing an abuse-of-discretion standard of review. ***ALFA Life Ins. Corp. v. Hughes***, 861 So. 2d 1088, 1095 (Ala. 2003) (citing ***Smart Prof'l Photocopy Corp. v. Childers-Sims***, 850 So. 2d 1245, 1248 (Ala. 2002)). Appellate review of whether the trial court applied the correct legal standard in reaching its decision to certify a class is reviewed under a ***de novo*** standard. ***Id.***

SUMMARY OF THE ARGUMENT

This Court should decertify the class action certified by the Trial Court on April 6, 2004, and finally approved on September 29, 2004 for three reasons. First, Vivian Gadson, the purported class representative, is not adequate to serve as the class representative. Because she was never insured under

any insurance policy issued by the Defendants, much less the policy made the basis of the instant case, she has no standing to file this case and her claims are not typical of or common to the claims of the class. Moreover, because of her lack of standing, Vivian Gadson did not posses the capacity to enter into any settlement negotiations or agreements and any such actions are a nullity. Furthermore, because of Ms. Gadson's unwillingness to represent the class as demonstrated by her inability to appear for her own Fairness Hearing or depositions or to answer interrogatories, the Appellant/Interveners were denied meaningful participation at the Fairness Hearing and the Trial Court judge was never exposed to the litigant and was further unable to properly conduct a rigorous Rule 23 analysis.

Second, the Settlement Agreement cannot meet the requirements of typicality, commonality, and adequate representation necessary for final approval. While the Settlement Agreement purports to represent both Georgia and Alabama class members, no member of either the Georgia or Alabama insured public was represented at the negotiations since Vivian Gadson lacked the capacity to serve as a class representative for any insured. Additionally, because Georgia's insurance laws create claims against the Defendants that are unavailable to the Alabama Plaintiff (assuming there had been one with standing to file this case) and indeed were not asserted in any of the Alabama Plaintiff's five complaints, the claims of the Georgia and Alabama class members are neither common nor typical. Additionally, the Georgia class members' claims do not meet the Rule 23 superiority requirement.

Third, the Settlement Agreement lacks the fairness, adequacy, and reasonableness essential to bind the classes. The Settlement Agreement's incorporation of waiver and forfeiture provisions are unfair. The substantive money award available under the Settlement Agreement is utterly inadequate, and the Settlement Agreement does not provide mean-

ingful equitable relief or punitive damages for fraud. The Settlement Agreement violates Georgia law, and the inadequate class action notice completely abandons the class members' Due Process rights.

ARGUMENT

I. THE TRIAL COURT ERRED IN CERTIFYING VIVIAN GADSON AS AN ADEQUATE CLASS REPRESENTATIVE WHERE THERE WERE FATAL SUBSTANTIVE AND PROCEDURAL IMPEDIMENTS TO HER CERTIFICATION.

In *Ex parte Prudential Ins. Co of America*, this Court found that "[i]f a named plaintiff has not been injured by the wrong alleged in the complaint, then no case or controversy is presented and the plaintiff has no standing to sue either on his own behalf or on behalf of a class." 721 So. 2d 1135, 1137 (Ala. 1998) (citing *Ex parte Exide Corp.*, 678 So. 2d 469, 474 (Ala. 1991); *see also Ex parte Blue Cross & Blue Shield of Alabama*, 582 So. 2d 469, 47.4 (Ala. 1991); *Ex parte Izundu*, 568 So. 2d 771, 772 (Ala. 1990)). Under ARCP Rule 23, it is an elementary principle that a class representative be a member of the class he or she purports to represent. *Amason v. First State Bank of Lineville*, 369 So. 2d 547, 549 (Ala. 1979) (stating that "Rule 23(a), ARCP inherently mandates that the person bringing the action must a member of the class he seeks to represent"). The Court of Appeals for the Fifth Circuit found that "[i]n order to have standing to bring a class action, the class representative must first and foremost be a member of the class which he seeks to represent." *Huff v. N.D. Cass Co. of Alabama*, 468 F.2d 172, 179 (5th Cir. 1972).[5] Indeed, the United States Supreme Court asserts that

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[5] "'Because the Alabama Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure, cases construing the federal rules are authoritative in construing the Alabama rules.'" *Funliner of Alabama, L.L.C. v. Pickard*, 873 So. 2d 198, 207 n.7 (Ala. 2003) (quoting *Reynolds*

a person "cannot represent a class of whom they are not a part." ***Bailey v. Patterson***, 369 U.S. 31, 33 (1962) (finding appellants lacked standing to enjoin criminal prosecutions under certain state statutes where they themselves had not been prosecuted or threatened with prosecution under the statutes); ***see also Hall v. Beals***, 396 U.S. 45, 49 (1969) (finding appellants could not represent the class of voters disqualified from voting because of a new two-month residency requirement where the appellants were not members of the class).

In the instant case, the proponents of this class action failed to even make a showing that Vivian Gadson is a member of the class she purports to represent, much less satisfy their burden of showing that Vivian Gadson is an adequate representative for the defined class.

A. Substantive impediments exclude Vivian Gadson from being certified as an adequate class representative because she had no standing to file this case and her claims are not typical of or common to the claims of the class pursuant to ARCP 23(a)(3).

Throughout the original complaint and all four amendments that followed, Ms. Gadson alleged that ***she*** was an insured under the AB 2000 policy and that ***her*** health and claim history were used to determine the amount of premium charged at renewal. [C. 3, 18, 57-58, 317]. Plaintiff filed her action on a MedOne policy, wherein she alleged that her insurance coverage was provided under master policy AB 2000, client No. 2400-006178. [C. 2-3]. Plaintiff further alleged that the Defendants were underwriting her policy on an annual basis "based upon her health and claim history and

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Metals. Co. v. Hill, 825 So. 2d 100, 104 n.1 (Ala. 2002) (citing *Cutler v. Orkin Exterminating Co.*, 770 So. 2d 67 (Ala. 2000))); *see also Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 816 (Ala. 2000).

that Plaintiff's health and claim history were the main factors used to determine the amount of premium charged . . . ." [C. 3]. Based upon these allegations, Ms. Gadson alleges in each and every one of her class action complaints that her claims as class representative "are typical of those of the class members in that she was subjected to the same unlawful treatment and Plaintiff suffered the same type of harm as suffered by other member so the class." [C. 55]. Indeed, Vivian Gadson even filed an affidavit in this case stating that she has insurance coverage with the Defendants. [C. 715]

Put simply, these assertions are false. Contrary to Appellee's allegations in her numerous class action complaints, the Certificate of Insurance issued in this case was actually issued to Jevon Gadson, Ms. Gadson's son. [C. 105]. Jevon Gadson, ***not Vivian Gadson***, is listed as the certificate holder or covered person under the Certificate of Group Insurance upon which Vivian Gadson based her individual claims and allegations that her claims were typical to those of the class. [C. 217, 223, 55]. Neither the Certificate of Group Insurance nor the Master Policy Certification submitted by AMS ever mentions Vivian Gadson as an "employer," "employee," "certificate holder," or an "insured" under the policy. [C. 105, 99].

The Certificate itself identifies that person to whom the health insurance coverage was issued as the employee/certificate-holder," which in this case, is Jevon Gadson, not the purported class representative, Vivian Gadson. [C. 105]. According to this same document, the certificate-holder was also the person who applied for the insurance coverage, which again, would be Jevon Gadson, not the purported class representative, Vivian Gadson. [C. 105, 118]. Each certificate of insurance listed an "employer" who was consistently identified as the same person that was listed as the "employee/certificate holder" on each respective certificate. [C. 105, and all others]. The persons who were insured under

each respective certificate were (i) the certificate holder and (ii) any dependent who was eligible for coverage. [C. 118A]. ***There is not one single shred of evidence in the record indicating that Vivian Gadson was ever an insured or a dependent of an insured under any policy or certificate of insurance underwritten by UWLIC or administered by AMS, much less under the policy/certificate number on which she bases her claims.*** Notably absent from each and every one of Appellee's individual or class action complaints is mention, reference, or allegation that Jevon Gadson is unable to represent himself as a certificate holder.[6] No allegations have been made that Jevon Gadson is incompetent or otherwise suffers from an infirmity or any other mental or physical condition that would prevent him from representing himself in a case where he, ***not Vivian Gadson***, is the only person who would have legal standing to bring such a suit under the certificate made the basis of this case.

Since Vivian Gadson was never an insured or a dependent under any insurance policy or certificate of insurance issued by any of the Defendants, Vivian Gadson could not possibly have had any renewal premium calculated "based upon her health and claim history." [C. 3]. Likewise, it would be impossible for Vivian Gadson's "health and claim history" to be "the main factors used to determine the amount of premium charged . . . ." [*Id.*]. Vivian Gadson is not now nor was she ever insured under any policy or certificate of insurance issued by the Defendants, much less the insurance plan made the basis of this class action settlement. Therefore, Vivian Gadson did not have standing to bring this lawsuit and her claims were not typical of those true members of the

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[6] There is no evidence in the records to reflect that Jevon Gadson is a minor or otherwise incompetent. Upon information, (Jevon Gadson's social security number that is reflected on the certificate [C. 1053]) Jevon Gadson's date of birth is May 1, 1976 which would make him twenty-nine years old as of the date of this submission.

offended class of persons whose claims history and health condition were actually used in calculating renewal premiums for their "group" health insurance. The Trial Court erred in certifying Vivian Gadson as a class representative.

In its Order Accepting the Stipulation of Settlement and Certifying a Temporary Settlement Class of April 6, 2004, the Trial Court certified a class of persons consisting of "***all persons and entities . . . in Alabama or Georgia who, at any time purchased or renewed in Alabama or Georgia a certificate of medical insurance from United Wisconsin Life Insurance Company.***" [C. 464-465] (emphasis added). Pursuant to the April 6, 2004 Order from the Trial Court, Notice was sent to the members of the purported class containing this exact same class description. [C. 414, Brown Envelope at tabs 5 & 6].

After the "Fairness" Hearing of September 8, 2004, counsel for the proponents and counsel for the interveners/objectors were asked to prepare their respective proposed orders for the Trial Court. [R. 183, Volume 8]. On September 29, 2004, the Trial Court entered its Final Order as submitted by class counsel approving the class action settlement and dismissing the case with prejudice. [C. 1032-1075]. The Final Order, however, ***certified a very different class*** than the class that was initially certified by the Trial Court, described in the Notice sent to prospective class members, and submitted by the Plaintiffs and Defendants to the Trial Court in their Stipulation of Settlement. In its Final Order, the Trial Court certified a class of persons consisting of:

> "all persons (including the named plaintiff) in Alabama or Georgia who at any time . . . purchased or renewed a certificate of group health insurance from United Wisconsin Life Insurance Company ***that provided coverage to that individual and/or his or her family.***. . . ."

[C. 1069] (emphasis added).

Apparently, counsel for Appellee realized that Vivian Gadson did not have standing to bring this case, and that she was not, as had been long maintained by Interveners, an individual with claims that were typical to those of the class. The proposed Order for Final Certification submitted by counsel for Ms. Gadson sought to correct this fatal flaw by inserting a new class definition in an obvious effort to make Vivian Gadson "fit" into a class of persons who were never insured under the policy made the basis of this case. Presumably, this "substitution" was done without bringing same to the Trial Court's attention. Surely, this "bait and switch" litigation tactic cannot stand. Certainly, the true class members deserve the same notice of the new class definition from which Vivian Gadson now benefits. Frankly, the members of this class of persons who have truly been insured and harmed deserve a class representative with claims that are typical to their own so that their interests are actually protected. Therefore, the Trial Court, undoubtedly without knowledge of the "substitution" of class definitions by class counsel in their proposed order, erred in certifying this class action. Moreover, the manner in which the proponents of this class action changed the class definition after Notice had already been sent to the class completely abandons even the most basic effort to protect the due process rights of the class members.

1. ***Even if Ms. Gadson fits within this newly defined "class," this new "class" is amorphous and thus uncertifiable.***

It is a fundamental principle underlying every class action that the purported class sought to be represented is adequately and properly defined and plainly ascertainable through reasonable effort. *Earnest v. Gen. Motors Corp.*, 923 F. Supp. 1469, 1473 (N.D. Ala. 1996); *Hardy v. U.S. Steel Corp.*, 289 F. Supp. 200, 202 (N.D. Ala. 1967). While it is not necessary that the class be so clearly defined that "any member can be

presently ascertained," *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970), "[f]ailure to meet this minimum standard entitles a court to dismiss the class allegations and proceed with the action on an individual basis." *Earnest*, 923 F. Supp. at 1473; *see Equal Employment Opportunity Comm'n v. D.H. Holmes Co., Ltd.*, 556 F.2d 787, 791 n.5 (5th Cir. 1977). Where class definitions are overly broad, vague, and amorphous, the court should deny class certification. *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003); *White v. Williams*, 208 F.R.D. 123, 129-130 (D.N.J. 2002); *McGuire v. Int'l Paper Co.*, Civ. A. No. 1:92-CV-593BRR, 1994 WL 261360 at *12-*14 (S.D. Miss. Feb. 18, 1994).

The "new class definition" in the instant case is analogous to the class defined in *Earnest*.[7] The *Earnest* Court found the class definition to be "so broad, amorphous, and vague that it fail[ed] to meet the minimum standard of definiteness," and went on to hold the class claims were due to be dismissed. 923 F. Supp. at 1274. Like the class definition found to be amorphous in *Earnest*, the "new class definition" in the instant case is also so overbroad and vague that it would not allow class membership to be ascertained through reasonable effort. Indeed, in order to determine who is a member of this "new class definition," each and every potential class member must be examined—the class definition is a moving target.

Indeed, the "new class definition" would include not only any person who, unlike Vivian Gadson, was actually insured under a certificate of insurance, but it would also include any family member of that insured who paid or contributed towards the payment of any insurance premium or renewal premium. These family members necessarily would extend to

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[7] The class was defined as "any persons in the State of Alabama who own or lease, or have in the past owned or leased vehicles equipped with engines and/or engine control modules manufactured, sold, assembled and/or designed by the Defendants such as those in the said vehicles of the named Plaintiffs." 923 F. Supp. at 1474.

mothers, fathers, brothers, sisters, cousins, aunts, uncles, grandparents, fathers-in-law, and so on infinitely. Certainly, a class definition such as the one these class proponents "slid in" would never allow any Trial Court to "reasonably ascertain" the identity of the class members with any degree of "reasonable effort". Rather, this "new class" is defined such that many persons who are not now nor have ever been insured by the defendants, such as Vivian Gadson, are now plaintiffs in a case where their respective health conditions were never considered in calculating renewal premiums as alleged in the various complaints. Additionally, this "new class" definition would require that any Trial Court must conduct an extensive inquiry into (i.) whether any potential class member is an insured under a certificate of insurance with the defendants; if not, then (ii.) the exact relationship of any person who claimed to be a family member of an insured to any respective insured; (iii.) whether that person (family member) has paid or contributed towards the payment of any purchase premium for the insurance; (iv.) whether that person has paid or contributed towards the payment of any renewal premium of his or her family member; and (v.) whether the person who claimed to be a family member could prove that he or she indeed made such payment and/or contribution. This type of rigorous inquiry was never meant to become necessary in order to simply identify who is a member of any particular class.

Indeed, the *Earnest* Court could easily have been speaking of the instant situation when it stated that "it would be virtually impossible to determine membership in the class." *Id.* at 1474.

B. Procedural concerns exclude Vivian Gadson from being certified as an adequate class representative because the unwillingness of Ms. Gadson to represent the class led to the inability of the Trial Court to properly conduct a rigorous Rule 23 analysis.

Ala. Code § 6-5-641 mandates that when deciding whether a class should be certified, "the court shall determine, by employing a rigorous analysis, if the party or parties requesting class certification have proved its or their entitlement to class certification under Ala. R. Civ. P. 23." Ala. Code § 6-5-641(e) (1975). The statute goes on to place the burden of proving certification entitlement under Rule 23 upon the party or parties seeking certification, and instructs that "if such proof shall not be adduced, the court shall not order certification of the class." *Id.* Ala. Code § 6-5-641 also places upon the judge deciding certification the responsibility to "place in the record of the action a written order addressing all such factors and specifying the evidence, or lack of evidence, on which the court has based its decision with regard to whether each such factor has been established." *Id.*

One of these factors is whether the plaintiff is adequate to represent the class. Ala. R. Civ. P. Rule 23. Many prescient holdings offer guidance into the inquiry that must be made in order to make a finding of adequacy. It has long been the law that "[a] plaintiff seeking class certification has the burden to establish that the requisites for certification are present." ***Byes v. Telecheck Recovery Servs., Inc.***, 173 F.R.D. 421, 423 (E.D. La. 1997) With regard to Rule 23(a)(4)'s requirement of adequate representation, "it is clear that some inspection of [the] individual representative is required." *Id.* at 426 (citing ***Jenkins v. Raymark Indus., Inc.***, 782 F.2d 468, 472 (5th Cir. 1986); 7 Wright and Miller, ***Federal Practice and Procedure*** § 1766). Furthermore, via the Trial Court's examination of Rule 23 criteria, "***it is necessary to eliminate so far as pos-***

sible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. *Eisen v. Carlisle*, 391 F.2d 555, 562 (2nd Cir. 1968) (emphasis added) (overruled on other grounds recognized by ***American Cyanamid Co. v. Stephen***, 600 N.E.2d 1387 (Ind. Ct. App. 1992)).

During the Fairness Hearing on September. 8, 2004, Ms. Gadson was called to testify. [R. 115, Vol. 8] Both Ms. Gadson and her attorneys knew the date and time of the Fairness Hearing, and yet, rather than making an appearance at the Hearing, Ms. Gadson and her attorneys proffered an affidavit signed by Ms. Gadson wherein she purported to know about both the facts and claims in the class action lawsuit that bore her name and stated further that all settlement negotiations were conducted with her knowledge and approval. [C. 714]

As was argued at the Hearing, counsel for Appellants/Interveners have grave doubts as to the propriety of Ms. Gadson's statements and her ability to represent the interest of the class that is and will be subjected to the existing parties' settlement. By filing a Brief on Objections, the existing parties knew well before the Fairness Hearing that counsel for Appellants/Interveners questioned Ms. Gadson's ability to represent this class. [C. 558]. Additionally, on August 19, 2004, Appellants/Interveners made their Motion to Intervene and to Propound Discovery upon existing parties. [C. 533] Included within this request was a notice of deposition for Vivian Gadson. [C. 550] Moreover, on September 3, 2004, and in an effort to secure Ms. Gadson's testimony, Appellants/Interveners requested the Circuit Court of Montgomery County to issue a subpoena for Ms. Gadson to be present at her hearing on September 8, 2004. [C. 945] After an exhaustive search, Ms. Gadson could not be found, relegating Appellants/Interveners to serve counsel for Ms. Gadson with said subpoena. Presumably and in anticipation

of the confirmation of Ms. Gadson's inadequacy and inability to represent the class, counsel for Plaintiff did not have Ms. Gadson appear at the hearing, but rather, filed a motion for protective order on September 2, 2004 and a motion to quash her subpoena on September 7, 2004. [C. 1410] The Trial Court never ruled on Appellants/Interveners request to propound discovery. Therefore, subsequent to the Fairness Hearing and before this Trial Court entered its Order of September 29, 2004, counsel for Appellants/Interveners On September 23, 2004 served another deposition notice upon counsel for Vivian Gadson to appear for deposition at the offices of her attorneys. [C. 1411] Not surprisingly, on September 27, 2004, counsel for Ms. Gadson filed yet another motion to quash her deposition and motion for protective order. [Id.] The Trial Court granted the Plaintiffs [sic] motion on September 29, 2004. [Id.] Finally, on October 26, 2004, Appellant/Interveners issued yet another subpoena for Vivian Gadson to appear at the hearing on reconsideration. [C. 947] Again, Vivian Gadson did not appear.

Neither the Trial Court nor the Appellants/Interveners ever had the chance to examine Vivian Gadson to determine her adequacy. The fact that Ms. Gadson continually evaded efforts made by counsel for the Appellants/Interveners to have her appear for deposition, answer interrogatories, Vivian Gadson's failure to appear at her own "Fairness" Hearing, and the repeated attempts made by her attorneys to keep her away from the courthouse speaks volumes about her ability to represent this class (both the "old" class and the "new class" that was defined by class counsel with their "substituted" definition). Why such an exhaustive effort to keep and prevent Vivian Gadson from giving any sworn testimony that would test those representations she and her attorneys made to the Trial Court? The answer is clear: counsel for existing parties knew, as counsel for Appellants/Interveners knew, that Vivian Gadson was not only an inadequate class representative, but also that she was never insured by AMS

under any type of medical insurance policy, much less the policy made the basis of this case, AB 2000, client No. 2400-006178. Certainly counsel for the proponents of this class action knew that if Vivian Gadson were ever to testify, this class action could never be certified under Alabama law. If indeed Ms. Gadson is an adequate representative as proffered by the existing parties, certainly there was nothing to fear from simple questioning to confirm what the existing parties represented to the Trial Court.

Vivian Gadson's evasive tactics should go unrewarded by this Court. Gadson's unwillingness and utter failure to actively represent a class of persons with whom she claims to be a part of, confirms what Appellants have already argued to this Court; to wit—Vivian Gadson is not an adequate representative for that class of persons who were insured through certificates of insurance issued by the underlying Defendants. Furthermore and as argued above, Vivian Gadson's apparent intent of and participation in negotiating away the claims of those, unlike herself, who are or were actually insured by the Defendants along with her willingness to completely abandon the due process rights of other members of this newly defined class, while she profits from the class' new definition, speaks volumes about her ability to adequately represent this class. Moreover, this same observation could be said for counsel representing the class Plaintiffs and Defendants in this case. Without question, the interests of the true class members have not now nor have they ever been represented or protected in this case. The Trial Court erred in certifying this case as a class action.

II. BECAUSE THE SETTLEMENT AGREEMENT WAS A PRODUCT OF NEGOTIATIONS THAT EXCLUDED EVERY MEMBER OF THE GEORGIA INSURED CONSUMING PUBLIC, THE SETTLEMENT AGREEMENT CANNOT MEET THE REQUIREMENTS OF TYPICALITY, COMMONALITY, AND ADEQUATE REPRESENTATION NECESSARY FOR FINAL APPROVAL.

As before, Vivian Gadson has no standing in this case and therefore cannot represent a class of persons with whom she shares a typical claim or controversy. More importantly, neither Vivian Gadson, nor her counsel had the capacity to enter into any settlement negotiations on behalf of the insured class thus making this Settlement Agreement a nullity. However, even assuming arguendo that Vivian Gadson did have standing (***which she most certainly does not***) this settlement still cannot be certified as the claims of the Georgia resident insureds vary greatly from those of the Alabama insureds.

The Settlement Agreement purports to represent class members in Georgia as well as class members in Alabama. [C. 464-465]. However, because there was no named plaintiff in this case that was a resident of Georgia, indeed there was no member of the Georgia or Alabama insureds with any standing whatsoever present at the negotiating table, and because the legal remedies available to potential Georgia class members are far greater than those available to Alabama class members, this Settlement Agreement does not meet the requirements for final approval, and as such should not have been approved or certified by the Trial Court.

A. Scrutiny of Pre-Certification Settlement Classes

The problems unique to settlement classes turn about the fulcrum of adequate representation of absent class members during negotiations. As Judge Posner explained,

> the danger of collusive settlements makes it imperative that the district judge conduct a careful inquiry into the

> fairness of a settlement to the class members before allowing it to go into effect and extinguish, by the operation of res judicata, the claims of class members who do not opt out of the settlement.

Mars Steel Corp. v. Cont'l Illinois Nat'l Bank & Trust, 834 F.2d 677, 681-82 (7th Cir. 1987).

Ordinarily, a court relies on class status, particularly the adequacy of representation required to maintain it, to infer that the settlement was the product of arm's length negotiations. Where the court has not yet certified a class or named its representative or counsel, this assumption is not justified.

Such is the case here, where the Alabama Plaintiff neither formally satisfied the Trial Court that she was adequate prior to negotiations nor assigned a Georgia plaintiff to represent the claims of the Georgia class members in those negotiations. The purported class representative stands untested and is in fact inadequate on the necessary factors of commonality, typicality, or adequate representation, particularly as to the Georgia class members.

When a settlement class is certified after the terms of the settlement are reached, courts must require a clearer showing of a settlement's fairness, reasonableness, and adequacy, and the propriety of the negotiations leading to it. *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 113 (S.D.N.Y. 1999). When a class is certified for settlement purposes only, the court must undertake a ***more rigorous*** examination to confirm that the requirements of Rule 23 are satisfied. *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 850 (Ind. 1997).[8] The dangers of collusion and,

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[8] The need for scrutiny of pre-certification class action settlements attracted the notice of Alabama's federal district court: "The conflict of interest problems inherent in class settlements recently led the Third Circuit to conclude that class-wide settlements must be scrutinized for the propriety of class certification just as vigorously as a litigation class action

incentives to settle quickly that accompany a "settlement" class action demand that the specifications of Rule 23, which were designed to protect absentees by blocking unwarranted or overbroad class definitions, receive ***strict scrutiny***. ***Polar Int'l***, 187 F.R.D. at 113 n.4. (emphasis added).

B. Georgia's Insurance Laws Create Claims Against the Defendants that are Fundamentally Stronger than those Arising Under Alabama Law, meaning the claims of the Georgia Insureds and the Alabama Insureds Are Neither Common Nor Typical.

As the complaints filed by the Alabama Plaintiffs support, the only claims considered by the Alabama Plaintiffs are basic, common law claims, unaided by the legislative or administrative direction. Prosecuting and successfully proving such allegations without the aid of statutory and regulatory insurance laws explicitly defining and proscribing the practices in which the Defendants engaged poses a major, though not insurmountable challenge. ***This exclusive reliance upon common law legal principles is a burden the Georgia Class member does not share with the Alabama Class member.*** "The strength of plaintiff's case on the merits balanced against the settlement amount is the most important factor in determining whether a settlement should be approved." ***Steinberg v. Sys. Software Assoc., Inc.***, 306 713 N.E.2d 709, 717 (App. Ct. Ill. 1999).

1. ***Georgia's specific and comprehensive statutory regulation of insurance practices provides Georgia insureds with greater legal protection than the legal protection available to Alabama insureds.***

A comparison of the complaints employed by the Alabama Plaintiffs and Georgia's statutory and regulatory prohibitions

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would be examined. ***Pipes v. American Sec. Ins. Co.***, 169 F.R.D. 382, 384 (N.D. Ala. 1996) (citing ***In re GMC Pick-up Truck Prods. Liab. Litig.***, 55 F.3d 76B, 794 (3d Cir. 1995)).

against the specific practice in which the Defendants allegedly engaged—tier rating of group health insurance—confirms the superior legal fortitude of the claims owned by the Georgia Class. Whereas the Alabama Plaintiffs faced the obstacles of proving common law fraud, breach of fiduciary duty, and breach of contract without the aid of specific legislative and regulatory prohibitions against tier rating schemes, the Georgia Class can instead assert highly specific breaches of legal duties, including a private right of action, based on the clear prohibitions outlined by the General Assembly of Georgia.

Georgia statutes and regulations explicitly prohibit the practices implicated in tier rating schemes. Georgia law, codified in O.C.G.A. § 33-30-12, prohibits the unfair practice of re-underwriting individuals who are already members of a health insurance group based on their individual health status so as to base their renewal premiums on their individual health. The Defendants' tier rating scheme runs afoul of multiple prohibitions contained therein.

First, the statute provides that "the claims experience produced by small groups covered under accident and sickness insurance for each insurer ***shall be fully pooled for rating purposes***" and that "the claims experience produced by any individual small group of each insurer ***shall not be used in any manner for rating purposes*** or solely as a reason for termination of any individual group." O.C.G.A. § 33-30-12(b) (emphasis added).

Second, O.C.G.A. § 33-30-12(c) requires full pooling of experience for rating purposes.

Third, the statute limits the practice of substandard rating, stating that "***[s]ubstandard rating . . . shall not be used for renewal rating purposes.***" O.C.G.A. § 33-30-12(d) (emphasis added).

Also, Georgia regulations establish strict rules for the administration and operation of group health insurance policies. Ga. Comp. R. & Regs. 120-2-10-.12 specifically governs small group health insurance access and pooling. The Defendants' tier rating scheme for the "MedOne" policies they sold and marketed as "group" health insurance policies violate this state regulatory provision in several respects. First, insurers must use "pool rates" to determine premiums for new and existing groups. When the class Defendants utilize an individuals [sic] claims experience to calculate renewal premiums, the class defendants are not "pooling rates." Furthermore, Ga. Comp. R. & Regs. 1202-10-.12(1)(k), paragraph (5) states that with regard to a new or existing group, an insurer may not "***use substandard rating for, nor adjust any individual or group premium by way of a substandard rating as a result of the health status of anyone who is not a New Entrant as defined by this Rule.***" Ga. Comp. R. & Regs. 120-2-10-.12(5) (f) (2) (i) (emphasis added).

Next, Ga. Comp. R. & Regs. 120-2-10-.12(3), regarding "Prohibitions," delineates practices by any insurer which "are prohibited with regard to small groups and the small group health insurance pool." First, the regulation prohibits "***tier rating which increases rates directly related to the tier within which any one small group's claims experience falls.***" Ga. Comp. R. & Regs. 120-2-10-.12(3) (b) (emphasis added). Second, the regulation prohibits any insurer with regard to small groups and the small group health insurance pool from engaging in "discriminatory rating practices which result in premium rate differentials for individual employee, member, enrollee, . . . based solely on any health status related factor or claims experience." (Ga. Comp. R. & Regs. 120-2-10.-12(3)(g)). Finally, Ga. Comp. R. & Regs. 120-2-10-.12(3) (h), states that "***[u]sing health status-related factors of any kind and in any manner for the development of group experience factors at renewal rating***" is prohibited practice for insurers in regards to such groups. (emphasis added).

Furthermore, Georgia law strictly regulates the form and content of advertisements regarding group health insurance policies such as those advertised by the Defendants. Ga. Comp. R. & Regs. 120-2-12-.16 specifically prohibit the advertising of insurance policies that, like "MedOne," carry group or quasi-group implications, unless such is the fact.

Together, the body of Georgia statutory and regulatory law prohibiting the Defendants' practices lends superior force to the actions of Georgia consumers entitled to the benefit of suing under these laws. Moreover, these statutory prohibitions provide additional support for those bringing suit under Georgia law, including the availability of a private right of action. For example, because Georgia law presumes that contracts for group health insurance sold in Georgia comply with Georgia insurance law, these laws buttress the Georgia consumers' claims for breach of contract. Similarly, because the Defendants are charged with knowledge of Georgia law, the claims of the Georgia consumer for fraud are strengthened on critical elements like scienter (intent) and false representation.

C. Lingering Concerns over Substantive Choice of Law Decisions: Why the Settlement Agreement Violates Rule 23's Superiority Requirement and Denied Georgia Insureds their Reasonable Expectation that their claims would be governed by Georgia Law.

Although the United States Supreme Court's opinion in ***Shutts v. Phillips Petroleum*** paved the way for extraterritorial class actions in state courts, so long as the standards of personal jurisdiction were satisfied, ***Shutts*** does not authorize state courts to foist one state's substantive law onto another state's citizenry in the name of class action "justice." 472 U.S. 797 (1985). To the contrary, the United States Supreme Court has held that state courts must beware applying state laws where those state laws are (1) substantive, rather than

merely procedural and (2) conflict with the substantive state law of the absent class members' state. ***Sun Oil Co. v. Wortman***, 486 U.S. 717, 730-31 (1988) (holding such action runs afoul of the Full Faith and Credit Clause and violates Due Process).

This Court should not allow the proponents of this class action and the Trial Court to arbitrarily impose Alabama law over a fundamental matter of substance in this case—the value of the Georgia Class members' claims. In ***Shutts***, the United States Supreme Court acknowledged that a class member's cause of action implicates a constitutionally protected property interest. 472 U.S. at 807. The Georgia Class did not have sufficient contact or relationships with Alabama for their. claims to be brought or settled under Alabama state law. ***See Duvall v. TRW, Inc.***, 578 N.E.2d 556, 559 (Ohio Ct. App. 1991). This Court observed that "the United States Supreme Court cautioned that in the context of class certification, the court may not take a transaction with little or no relationship to the forum and apply the law of the forum to satisfy the procedural requirement that there be a common question of law." ***Ex parte Exxon Corp.***, 725 So. 2d 930, 932 (Ala. 1998) (citing ***Shutts***, 472 U.S. at 821).

The presence of an extensive regulatory and statutory prohibition in Georgia, when compared with the absence of such prohibitions in Alabama, supports a finding that the dual-state class action settlement sought by the existing Plaintiffs and Defendants cannot satisfy the superiority requirement of Rule 23. ***See, e.g., Ex parte Green Tree Fin. Corp.***, 723 So. 2d at 9 (instructing that in multi-state class actions, variations in state law may "swamp" common issues, defeating predominance and superiority tests); ***Ex parte Citicorp Acceptance Co.***, 715 So. 2d 199, 204 (Ala. 1997) (requiring a "rigorous" analysis of applicable choice of law). Here, the law of two different states would apply to different class members' claims. The make-up of those laws differ considerably.

For the same reason that lumping two disparate types of claims together is not a superior method to litigate such claims, a settlement that treats such disparate claims interchangeably falls short of a "superior" settlement. Rule 23's superiority element asks the court to weigh, among other factors, the desirability or undesirability of concentrating the litigation of the claims in the particular forum. FRCP Rule 23(b)(3)(C); ARCP Rule 23(b)(3)(C). The concentration of the Georgia Class members' claims in an Alabama court where the claims are settled as if they were Alabama claims under Alabama laws cannot meet the superiority requirement—even when applied to a class certified for purposes of settlement.

In the instant case, because the claims of the Georgia consumer implicate substantially different factual and legal issues, the claims asserted in the instant Class lack the commonality and typicality necessary to sustain the Settlement Agreement, and as in ***Ex parte Green Tree***[9], the differences in state law swamp whatever common issues might exist.

Certainly, Georgia insured [sic] harbor a reasonable expectation that their claims against the Defendants should be governed by Georgia law. There exists a reasonable expectation, under either Georgia or Alabama choice of law rules, that the Georgia Class members' insurance contracts and tort actions would be governed by the strictures of Georgia law. ***Gen. Tel. Co. of Southeast v. Trimm***, 311 S.E.2d 460, 461-462 (Ga. 1984) (observing that in contract actions, Georgia follows traditional rule applying law of the place where the contract

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[9] The Court of Appeals for the Fifth Circuit came to a similar conclusion, then went on to state that these differences could also defeat the predominance and superiority requirements of Rule 23. ***Castano v. Am. Tobacco Co.***, 84 F.3d 734, 741 (5th Cir. 1996) (stating that the court must consider variations in state law and how they affect predominance and superiority).

was made); *Ex parte Owen*, 437 So. 2d 476 (Ala. 1983) (finding that Alabama follows traditional view that contract is governed by law of state where it is made).

The Georgia Class members are entitled to the benefit of Georgia law both because it offers them a stronger hope of success in establishing liability against the Defendants, and, quite simply, because their claims should naturally be viewed through the lens of Georgia insurance regulations.

The Trial Court erred in failing to apply the above discussed stricter prohibitions and legal variations to those claims of Georgia insureds during the certification of the settlement in this case that resulted in the unjustifiable diminishing of the value of the Georgia Class members' claims thus suggesting that this case does not meet the superiority requirement of ARCP 23.

III. BECAUSE THE SETTLEMENT AGREEMENT LACKS THE FAIRNESS, ADEQUACY, AND REASONABLENESS NECESSARY TO BIND THE CLASSES, THE SETTLEMENT AGREEMENT SHOULD BE REJECTED.

A. The incorporation of waiver and forfeiture provisions for late-filed returns are unfair, inadequate, and unreasonable.

Given that class members will be bound by not opting-out, the forfeiture provisions for late-filed returns seems unnecessarily unfair, especially when there seems no plausible explanation why late-filed claims could not be honored for some reasonable, extended period.

The Trial Court correctly raised this question during the Fairness Hearing with regard to the money that remains unclaimed by the class members. [R. 80, Vol. 8] Under the Stipulation in the Settlement Agreement, refunds are given on a claims-made basis. While counsel for the Plaintiff was

unclear about where the unclaimed settlement funds would go in the event of non-claim, the Stipulation itself calls for any unclaimed refund by class members to be forfeited. [R. 80, Vol. 8; C. 401] Thus, it can be safely stated that any and all unclaimed money remaining after the expiration of the short sixty (60) day claim window will be returned to the Defendants, rather than inuring itself to the benefit of the Class members. Certainly, fundamental fairness dictates that a Defendant should not be allowed to retain any of its ill-gotten gains, and yet this Stipulation, along with its many other inherent flaws and inequities, allows these Defendants to do this very thing.

B. The substantive money award is grossly inadequate and unfair.

Rather than provide a healing balm, the Settlement Agreement rubs salt in the wounds of the Class members. The monetary provisions of the agreement include the following:

> (1) a sixty-seven percent (67%) refund of the amount class members paid in premiums as a result of their health status being considered to determine renewal premiums less a 10% durational factor; [C. 396]
>
> (2) a premium credit voucher of ten dollars ($10) per month for twenty-four (24) months, subject to conditions that are onerous and extremely disadvantageous to the Class members; [Id.]
>
> (3) a free phone call to the Defendants [sic] "Nurse Healthline" which the Settlement Agreement values at twenty-seven dollars and fifty cents ($27.50). [C. 397]

These provisions are woefully inadequate. For example, the "67%" refund is especially insufficient for Georgia consumers, for whom such unlawfully raised premiums would arguably be *wholly recoverable* under state statutes and insurance regulations.

During Class counsel's presentation of their case, the Trial Court inquired as to the amount of the refund. Counsel for Plaintiff represented to the Trial Court that the refund for each class member would consist of sixty-seven percent (67%) of the entire premium paid by each class member. [R. 68, 78 Vol. 8] This representation is not accurate. The class notice itself reads:

> Class member will be entitled on a claims-made basis to a refund equal to sixty-seven percent (67%) of the amount the individual class member paid in premium ***as a result of his or her individual health status being considered*** to determine renewal premiums ***less the amount her or she would have paid had a 10% durational factor been applied at renewal*** in lieu of taking individual health status into account.

[C. 396] (emphasis added).

To properly explain to the Trial Court the meaning of this refund, Appellants/Interveners offered a group of documents produced by American Medical Security, Inc. ("AMS") in another case. [C. 1001] According to testimony retrieved from Defendants, AMS attributes three categories of items as being considered in determining any given insured's health insurance renewal premium. These items are "changes in new business rates"; "changes in case characteristics", and "changes in claims experience."

As counsel for Appellants/Interveners learned through discovery in a separate case, AMS's position is that it is this ***third category*** only (i.e., "changes in claims experience") under a tier rating methodology that an individual's health status is used to determine the amount of the renewal premium. [C. 1004] The above methodology is explained by the Defendants in a letter to the Alabama Department of Insurance dated August 5, 1999. [C. 1010]

Thus, in reading the class notice, it would appear that rather than receiving "sixty-seven percent (67%) of an insured premium," as counsel for Plaintiff represented to the Trial Court during the Fairness Hearing, the truth of the matter is that any insured would only receive 67% of this third item (i.e., "change in claims experience") listed in premium renewal calculation, ***not 67% of the entire premium.*** This significantly reduced amount is further discounted by the use of a "ten-percent (10%) durational factor." [C. 396]

As this Court can see, the refund offered in this settlement agreement is substantiality less than what was represented to the Trial Court by Plaintiff's class counsel during the Fairness Hearing. In fact, according to previous testimony by Tim Ryles[10] during the evidentiary hearing before the Superior Court of Cobb County, Georgia, each individual class member will only actually receive about twenty-three percent (23%) of the amount that the above referenced *THIRD ITEM* contributed to each insured's premium increase at renewal. [C. 1004] As indicated during the Fairness Hearing, this amount is also less than what is believed that these cases are worth on an individual basis. [R. 112, 113, Vol. 8]

Additionally, the Class will take no joy in the "premium credit vouchers." [C. 396, 397] The Settlement Agreement values such vouchers at $240. To fully realize this benefit, however, Class members must either (1) be currently insured, having endured illegal overcharges in premiums; or (2) must return to the Defendants, electing to purchase health insurance from them again. Moreover, in order to fully realize the benefit of their measly ten dollar per month voucher, the Settlement Agreement makes receipt of the voucher benefit contingent on Class members managing the logistical burden and inconvenience of mailing twenty-four separate vouchers

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[10] Former Insurance Commissioner for the State of Georgia and the listed expert witness for the class Plaintiff [C.594-618, R. 129 (Vol. 8)].

every month for twenty-four months with their premium payment in order to have the credit applied. Although there must be ways for the Defendants to track and credit the Class members' accounts automatically, the Settlement Agreement adopts a mechanism designed to ***minimize***, rather than maximize, the benefits realized by the Class members.

Notably, those electing to return to the Defendants to realize the benefit of the voucher must "meet standard underwriting requirements." [C. 397] Presumably, the "standard underwriting requirements" bar the return of those unfortunate Class members who became seriously ill, made claims on their policies, saw their renewal premiums skyrocket, became unable to pay, lost coverage, and remain uninsurable because of their continuing illness or unfavorable health history. [C. 592] The Settlement Agreement's complete failure to advance the interests of the Class members the Defendants exploited in the most unconscionable way should move this Court to recoil in disgust, as the Defendants seem to have found a way to exploit these Class members once again.

C. Meaningful equitable relief is conspicuously absent in the Settlement Agreement, and, thus renders the Settlement Agreement inadequate, unfair, and grossly unconscionable, especially for those insureds who were rendered uninsurable due to Defendants' illegal practices and completely abandoned under the Settlement Agreement.

The Settlement Agreement's substantive money award exposes this settlement as a grossly unfair abdication of Class counsel's fiduciary responsibilities to not only the Georgia Class members, but the Alabama Class members as well. As uncovered in investigations and as eluded to by the website of Plaintiff's class counsel, there are two types of discrete injuries associated with the illegal practices in which the Defendants engaged. Some Class members were overcharged,

yet managed to preserve their insurance. Sadly, some Class members suffered far graver financial damage when their renewal premiums dramatically increased and they became incapable of continuing to pay the renewal premiums. In some cases, such Class members became uninsurable on the open market. For such Class members, the Settlement Agreement represents an outrageously craven betrayal at the hands of the Defendants and the Class counsel who purported to represent them.

Furthermore, the Settlement Agreement provides no relief for insureds who have become "trapped". In other words, these persons are those that were insured with the Defendants, became stricken with a serious malady such as cancer, Gardner's disease, heart disease, etc. and due to the Defendants [sic] rating practices, had their renewal premiums increased 50%-100% equating to sometimes $3,000.00 to $4,000.00 per month or more in premiums. [R. 108, 111 Vol. 8] Because these policy holders developed their respective conditions during their coverage period rendering them uninsurable by any other insurance company on the open market effectively "trapping" these persons into paying greatly inflated premiums in order to keep their coverage in force often exhausting their life savings and retirement in order to meet the Defendants [sic] premium demands.

As discussed *supra* at p. 38, the "67%"refund is especially inadequate for Georgia consumers, for whom such unlawfully raised premiums would arguably be wholly recoverable. Further, such a pittance does absolutely nothing for consumers who, after paying Defendants for health insurance and falling ill, Defendants successfully drove from their rolls. To the contrary, the Settlement Agreement extinguishes the Class's legal claims for this unconscionable practice. It immunizes the Defendants from legal liability for such claims in exchange for a mere 67% of the illegal excess of the premiums those persons paid Defendants, which when factoring in

the 10% durational factor is actually equivalent to ***less than*** ⅓ of the amount Defendants illegally overcharged its insureds until they could pay no more and were cast into financial ruin, uninsured and cheated.

Unfortunately, despite their awareness of Defendants' scheme to "constructively cancel" the policies of unhealthy class members by "rais[ing] the premiums to a point that particular class members could no longer afford the policy and would be forced to let the policy lapse," [C. 317], the subject Settlement Agreement aids the Defendants in securing the cancellation of meaningful remedies for such individuals. The need for protection of those persons who were rendered uninsured by the Defendants' illegal and fraudulent scheme requires meaningful equitable and/or injunctive relief that the Settlement Agreement wholly lacks. The absence of such meaningful relief is inexcusable. Nowhere do the existing parties agree or even suggest that the Defendants accept returning Class members that the Defendants had driven from their rolls ***without regard to health problems*** so long as those health problems arose anytime after the execution of the original insurance agreement with the Defendants. Nowhere do the existing parties agree or suggest the appointment of receivers or court officers to ensure that the Defendants comply with acceptable underwriting practices or assess penalties for non-compliance under the court's inherent contempt powers. The subject Settlement Agreement is simply devoid of any measures to ensure that the Defendants comply with the paltry remuneration offered to the Class.

Interveners also provided the Trial Court with the Preliminary Order on Certification for another class pending in Florida against these same Defendants styled ***Addison v.. United Wisconsin Life Insurance Company, et al.*** in which questions of liability went to trial and a ruling was entered against the Defendants. [C. 1308]. Interveners brought to the Court's attention the great disparity in the relief provided in

the *Addison* class (including the acceptance of persons who were driven into uninsurability being placed back upon Defendants rolls and the great reduction in premium requirements for those who became "trapped" within the Defendants' insurance) and the relief being proposed in the instant class action. [C. 1308] Despite this aid in ascertaining and defining meaningful and fair relief for the Class, the Trial Court chose to ignore this instructive document and enter an amended order on November 10, 2004 that, rather than address the requests made in Appellants' motion to alter, amend or vacate, instead attempted to cure the Trial Court's failure to issue an order that complied with Alabama Code § 6-5-641.

The result of the Settlement Agreement's terms will be to sell the claims of overcharged consumers cheaply, and, for an appalling encore, aid and abet the Defendants in barring the door against those Class members that the Defendants succeeded in driving away based on their poor health. It is a bitter irony, indeed, that the Settlement Agreement assesses the heaviest penalty upon those consumers whose need for affordable group health insurance was greatest.

D. The Settlement Agreement violates Georgia law.

The Alabama Settlement Agreement incorporates provisions that clearly violate Georgia law. Georgia's General Assembly prohibited the use of durational factors in calculating renewal premiums in the same breath that it banned the use of tier factors. O.C.G.A. § 33-30-12(d) ("Durations since issue and tier factors may not be considered."). Indeed, a Georgia judge relied on this violation when it enjoined AMS from pursuing this Alabama Settlement Agreement against Georgians. [C. 494][11] Additionally, Tim Ryles, the former

[11] It is important to note that Defendants' appeal of Judge Grubbs' decision is currently before the Georgia Supreme Court. This pending appeal is yet another reason for this Court to decertify this class action in

insurance commissioner for the state of Georgia and the expert witness listed by class plaintiff in her Rule 26 disclosures in this case, testified that durational rating is not permitted under Georgia insurance regulations. [R. 170, 179 Vol. 9]

The Alabama Settlement Agreement enshrines the prohibited concept of durational factor rating in two separate places. First, the Alabama Settlement Agreement incorporates a 10% durational factor in the calculation of the monetary relief under section B(1)(a). [C. 396] Second, the Settlement Agreement references "injunctive relief" that purports to notify Georgia consumers that in the future only durational factors, not tier factors, will be used to calculate renewal premiums. [C. 397, 441] Exhibit F to the Settlement Agreement defines a durational factor by stating that "[a] durational factor is a percentage increase that is applied based on the length of time a policy has been in force . . . ." [C. 441] Only this Settlement Agreement would describe such a notice as "relief."

In this regard, the Alabama Settlement Agreement awards itself the dubious distinction of pioneering class action settlements that, under the guise of providing injunctive "relief," notify the purported Georgia class members that Defendants intend to substitute one illegal practice for another. To call Exhibit F "injunctive relief" uproots the term "relief" from its conceptual underpinnings. The Settlement Agreement redefines "relief" to secure a judicial ratification of Defendants' scheme to continue violating Georgia's law governing group health insurance. Surely this Court will not stamp its approval on Defendants' attempt to merely trade one illegal renewal rating methodology for another, as the Settlement Agreement is in clear violation of Georgia law.

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its entirety (which would certainly be warranted since there is no class plaintiff with standing to bring this case or that has claims typical to those of the class).

E. The Class Action Notice is Inadequate and Due Process Protections have been Completely Abandoned

1. *Notice given under the "new class definition" was inadequate to afford Due Process.*

This Court has stated that in order to comply with the requirements of due process, "what type notice, if any, is due in a class action depends on how the class is certified." *Taylor v. Liberty Nat. Life. Ins. Co.*, 462 So. 2d 907, 911 (Ala. 1984). Notice is mandatory only in class actions certified under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2). Thus, in order to afford absent plaintiffs due process protections, in cases such as the instant case "[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Shutts*, 472 U.S. at 812 (1985). The Court of Appeals for the Eleventh Circuit delineates what notice of a class action should contain: "[s]urely the best notice practicable under the circumstances cannot stop with . . . generalities. It must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member . . . ." *Twigg v. Sears, Roebuck, & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103-1105 (5th Cir. 1977). Where "the notices do not adequately inform an absent class member . . . that claims like his were being litigated or that they had been settled," the notice does not comport with due process. *Twigg*, 153 F.3d at 1229.

As the Trial Court certified this class action under Rule 23(b)(3), notice is mandatory. Even assuming arguendo that the "new class definition" is proper, under the "new class definition" (i.e., the class definition that was "substituted by the proponents for this class certification and that contained in the Trial Court's Final Order of September 29, 2004), there

has been ***absolutely no due process*** given because potential class members received ***no notice*** of the new class definition. Indeed, Vivian Gadson is likely the only non-insured "family member" to reap any benefit from the settlement of this class action lawsuit that was erroneously certified by the Trial Court. However, because the "new class definition" is amorphous, there is no proper class definition—as explained *supra* at p. 24-25, a court cannot determine the membership of this "new class definition" without examining each and every potential class member. Because there has been zero notice given to the potential members of this "new class definition," there has been zero due process afforded those individuals. Accordingly, the Trial Court abused its discretion in certifying this case as a class action as there was absolutely no notice and thus no due process provided to the class members as defined in the Court's Final Order of September 29, 2004.

IV. THE TRIAL COURT ERRED WHEN IT CERTIFIED THIS CLASS ACTION WITHOUT CONDUCTING A RIGOUROS ANALYSIS PURSUANT TO ALABAMA LAW AND WHEN IT FAILED TO ENTER AN ORDER CONFORMING WITH ALA. CODE § 6-5-641.

Alabama law is clear that a "rigorous analysis" must be employed in deciding whether a party or parties have proven their entitlement to class certification. (See Ala. Code § 6-5-641). A trial court is to conduct this analysis with respect to all ARCP 23 factors and afterwards, "shall place in the record of the action a written order addressing all such factors and specifying the evidence, or lack of evidence, on which the court has based its decision with regard to whether each such factor has been established." (Ala. Code § 6-5-641). Here the Trial Court clearly erred in failing to enter such a written finding.

Following the "Fairness" Hearing of September 8, 2004, the Trial Court entered its Order of Final Approval and Final

Judgment on September 29, 2004. [C. 1032] An examination of this Order that was, as explained above, submitted by counsel for the proponents of this class certification, reveals that the Trial Court dedicated a great deal of discussion on the lack of credibility of Tim Ryles, the former insurance commissioner for the state of Georgia and who was the only listed expert in the class Plaintiff's Rule 26 disclosure in this case. [C. 1407] Even more interesting is that the Trial Court delivered a fourteen (14) page discussion of the $2.5 million dollars in attorney fees that was agreed upon by the class Plaintiffs and Defendants. *Never in any portion of the Trial Court's September 29, 2004 Order does the Trial Court attempt to comply with the strictures of Ala. Code § 6-5-641.* Because the Trial Court failed to enter an Order that complies with Ala. Code § 6-5-641, the Trial Court erred in certifying this case as a class action and its ruling is due to be reversed. (*See Disch v. Oxmoor House, Inc.*, 2004 WL 2418061 (Ala. Oct. 2004)

Appellant/Interveners filed their Notice of Appeal in this matter on November 9, 2004 listing, among other reasons for appeal, that the Trial Court failed to comply with Ala. Code § 6-5-641. Interestingly, the Trial Court, without a written request from any proponent to this class action entered another Order on November 10, 2004 amending its Order of September 29, 2004 wherein the Trial Court then attempts to conduct a "rigorous analysis" of the evidence in this case and to deliver its findings in the form of a written order. [C. 1382] The Trial Court's November 10, 2004 Amended Order ("November Order") should be disregarded by this Court. The November Order was entered in violation of Ala. R. Civ. Pro. 52(b), as it came more than thirty (30) days after its Final Order and was entered without any party requesting that the Trial Court perform a Rule 23 analysis.

Furthermore, the Trial Court lacked jurisdiction over this case at the time the November Order was entered. Alabama

Code § 6-5-642 clearly states that during the pendency of an appeal of certification, "the action in the trial court shall be stayed in all respects." Ala. Code § 6-5-642. Here, the Trial Court entered the November Order after a Notice of Appeal had already been filed. [C. 1396] Therefore, the Trial Court had no jurisdiction over this matter at the time of the November Order's entry and the Order is thus due to be ignored.

Even if this Court were to consider the Amended Order of the Trial Court, an examination of the Order itself reveals that it too, like the September 29, 2004 Order is lacking and fails to comply with Alabama law. For example, the November Order still concludes that Vivian Gadson, is an adequate class representative and that her claims are typical of those of the class members. [C. 1390, 1391] As argued above, neither the Trial Court nor the Appellant/Interveners ever had any opportunity to conduct an examination of Vivian Gadson at the "Fairness" Hearing. If Appellant were allowed at the "Fairness" Hearing to examine the class plaintiff to tests her representations, surely Vivian Gadson would never have qualified as an adequate representative for this class. Clearly, the Trial Court did not apply the correct legal standards in conducting its analysis of the adequacy of Vivian Gadson to represent this class, but rather relied on the inaccurate stipulations between two parties who clearly "sold out" the interest of true class [sic] in exchange for $2.5 million dollars in attorney fees after taking one deposition and failed to protect the interests of any true class member. Moreover, if the Trial Court itself had conducted any examination of Vivian Gadson thus fulfilling its duty to conduct a "rigorous analysis" of the factors under ARCP 23, the truth would certainly have risen to the surface; that is, that with the exception of the unfounded and untrue allegations of Vivian Gadson in her multiple complaints, amendments thereto and in an affidavit, all evidence in this case shows that Vivian Gadson is not an adequate representative. If this were not the case, certainly the proponents of this class action would never

have attempted to redefine the class with an eleventh hour "substitution" of the class definition. This class action is due to be decertified pursuant to Alabama law.

CONCLUSION

If ever there was a class action that was ripe to be decertified by this Court it is certainly this one. This Court should reverse the Trial Court and decertify the class for three reasons. First, because Vivian Gadson was never insured under any health insurance policy sold by Defendants, thus her claims history or health condition could never have been used to determine insurance premium renewal rates. Because, Vivian Gadson did not and does not have legal standing, she did not have the capacity to enter into any type of settlement on behalf of a class of persons of which she is not even a member. There is a complete lack of an adequate class representative and the existing parties, including class counsel, have failed to both protect the interest of the defined class and satisfy the requirements of ARCP 23. The attempt by the proponents of this class action cannot cure this fatal flaw by redefining the class after Notice has already gone to the purported class members.

Second, because the settlement agreement was a product of negotiations that excluded every member of Georgia insureds and the legal remedies available to the Georgia consumer under Georgia law are greater than and different from those available to the Alabama insured under Alabama law, the claims of the Georgia insured and the Alabama insured are not common or typical. Thus, the settlement agreement cannot meet the requirements of typicality, commonality, and adequate representation necessary for final approval.

Third, the Settlement Agreement proffered by the existing parties in this case is patently unfair to the Class. The terms of the agreement are grossly unfair in terms of the monetary compensation that will actually be realized by the class, and

the non-monetary relief is of little to no value to members of the class, especially to those who were driven from the Defendants' rolls and are now without the benefits of health insurance. The requisites surrounding the rigors of realizing what little relief that is being offered are unreasonably burdensome. The terms of the settlement are in violation of the laws of the State of Georgia, whose citizens the Settlement Agreement purports to represent and bind, and the notice (or lack thereof as the case may be) does not afford the requisite Due Process protections for any member of this class.

WHEREFORE, PREMISES CONSIDERED, Appellants/ Interveners respectfully request this Honorable Court to reverse the Trial Court judge and decertify the class.

Respectfully submitted,

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APPENDIX D

IN THE SUPREME COURT OF ALABAMA

CASE NO. 1040260

ANGELA KING, VALERIE ASKEW, CHARLES J. KAHN, JANA HUTCHINSON, and SHARON HENDERSON,
Appellants

v.

VIVIAN GADSON, UNITED WISCONSIN LIFE INSURANCE COMPANY, AMERICAN MEDICAL SECURITY, INC. and AMSOUTH BANK,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
CV-02-1601

BRIEF OF APPELLEE VIVIAN GADSON

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees do not believe that oral argument is needed for the Court to dispose of this appeal and, therefore, do not request oral argument. Because this matter involves the settlement of a class action pursuant to the requirements of Rule 23 of the Alabama Rules of Civil Procedure and Ala. Code § 6-5-641, the legal issues and applicable standards are straightforward and well-settled by this Court. Moreover, the Court is reviewing the trial court's ruling here only for an abuse of discretion in approving a settlement supported by the defendants and more than 98% of the plaintiff class.

It is vital from the outset that the Court understand the true nature of this appeal. At the very time the parties to this lawsuit reached a settlement and proposed it to the trial court, the lawyers who represent the appellants/objectors filed a copycat class action in Georgia. These same lawyers also have at least thirty (30) individual opt-out/excluded cases pending against the same defendants. In its final order, the trial court found this fact to be the true motive behind the objections to this settlement. Thus, while the appellants here are presented by their attorneys as objectors concerned about the actual fairness of this class settlement, in reality, they are more akin to pawns being used to achieve goals wholly inconsistent with those of the class.

As will be demonstrated in this brief, and as the trial court determined, the settlement reached in this case is eminently fair and is supported by more than 98% (more than 30,000 people) of the plaintiff class. The present appeal is nothing more than a thinly veiled effort to advance appellants' counsels' personal agenda and quest for attorneys' fees at the expense of the class. Such conduct should be seen for what it is and should not be sanctioned by this Court.

Therefore, although plaintiff does not believe that oral argument is necessary, should the Court desire to hear oral argument from the parties, Appellee Vivian Gadson and her counsel stand ready to appear.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered by the Circuit Court of Montgomery County, Alabama certifying a class and approving a class action settlement. The Alabama Supreme Court has authority to review such final judgments pursuant to Ala. Code § 12-22-2. *See generally Dickerson v. Alabama State University*, 852 So. 2d 704, 705 (Ala. 2002) (quoting *Ala. Code* § 12-22-2) ("An appeal as a matter of right can be taken '[f]rom any *final judgment* of the circuit court.'").

On April 6, 2004, the trial court entered an order certifying a temporary settlement class in this case, approving and ordering notice to the members of the class, and setting a fairness hearing for September 8, 2004. [C. 464-71].

On May 17, 2004, objectors Jana Hutchinson and Sharon Henderson filed a motion to intervene, but withdrew then that motion on May 28, 2004. [C. 472-90]. On August 19, 2004, objectors Angela King and Valerie Askew filed their motion to intervene. [C. 533-43]. On September 7, 2004, the day before the fairness hearing, objector Jack Cahn filed his motion to intervene, [C. 982-84], and objectors Jana Hutchinson and Sharon Henderson sought to "revoke" the earlier withdrawal of their motion to intervene. [C. 1036]. At the September 8, 2004 fairness hearing, the trial court granted each of the motions to intervene "for the limited purpose of allowing them to appear and assert their objections . . . ." [C. 1036].

On September 29, 2004, the trial court entered a final order approving a class action settlement reached by a plaintiff class of more than 30,000 persons in Alabama and Georgia represented by Vivian Gadson with defendants American Medical Security, Inc., United Wisconsin Life Insurance Company, the Prescription for Good Health Trust, and AmSouth Bank. [C. 1032-1075]. On October 6, 2004, the appellants (who are five individual objectors to the class action settlement) filed a motion to reconsider [C. 1175-76], and on

October 29, 2004, filed a motion to alter, amend, or vacate the trial court's September 29, 2004 order. [C. 1305-07].

After conducting a hearing on November 1, 2004, the trial court entered an order and opinion on November 10, 2004 denying the motion to reconsider, denying the motion to alter, amend, or vacate the prior order, and clarifying its September 29, 2004 order in light of the issues raised by the objectors. [C. 1382-95]. On November 9, 2004, the day prior to the trial court's issuance of its final order, the objectors filed their notice of appeal to this Court. [C. 1396-97].

Rule 4(a) (5) of the Alabama Rules of Appellate Procedure "provides that a notice of appeal filed before the disposition of all postjudgment motions shall be held in abeyance until any remaining postjudgment motions are disposed of." *New Addition Club, Inc. v. Vaughn*, No. 1022075, 2004 WL 1588103, *2 n.2 (Ala. July 16, 2004) (not yet released for publication); *see also Walls v. Walls*, 860 So. 2d 352, 355 (Ala. Civ. App. 2003); *N.H. v. Vickers*, 865 So. 2d 452, 454 (Ala. Civ. App. 2003); *J.H.F. v. P.S.F.*, 835 So. 2d 1024, 1026 (Ala. Civ. App. 2002). "Rule 4(a)(5) further provides that such a notice of appeal becomes effective on the date the last postjudgment motion is disposed of." *Vaughn*, 2004 WL 1588103 at *2. Here, the November 9, 2004 notice of appeal was held in abeyance until the court entered its November 10, 2004 order, and the notice of appeal became effective November 10, 2004.

[portions omitted]

1. *The September 8, 2004 Hearing.*

During the September 8, 2004 fairness hearing, after first being allowed to intervene, the objectors' counsel informed the trial court that they wanted to call Ms. Gadson to the stand as a witness and examine her under oath. [R1. 115-18]. The trial court noted that Ms. Gadson was not present and had not been properly subpoenaed by the objectors (who sought to do so only on the eve of the hearing). [*Id.*]. Ms. Gadson

had already submitted substantial evidence, through an affidavit, to enable the trial court to consider her acceptability as the class representative. [C. 714-15].

In response, the objectors' counsel revealed to the trial court that, well prior to the hearing, they had directly telephoned Vivian Gadson, conducted an ex parte interview of her, and had secretly recorded this interview. [R1. 118-127]. Remarkably, the objectors' counsel actually sought to play a tape and introduce their transcript of this unlawful secret interview into evidence in this case. [*Id.*]. After reviewing the transcript, the trial court concluded that such conduct was clearly prohibited by the Alabama Rules of Professional Conduct, but indicated that it would allow the transcript into evidence if the objectors insisted on doing so. [*Id.*]. For obvious reasons, the objectors declined. [*Id.*].

2. *The November 1, 2004 Hearing.*

Following the trial court's entry of its September 29, 2004 final order, the objectors filed several post-judgment motions. At the subsequent November 1, 2004 hearing on those motions, and despite having already been admonished by the trial court for their unethical conduct, the objectors' counsel began the November 1, 2004 hearing by once again asking to examine Ms. Gadson under oath. [R2.5]. In response, the trial court ruled that it would indeed allow objectors to question Ms. Gadson, but that it would also require the objectors' attorney who had improperly interviewed Ms. Gadson—Andrew Hollis—to appear and provide testimony. [R2.5-8, 19, 21].[7] Specifically, the trial court stated:

> THE COURT: I'm going to open this record up and we're going to do that. Okay? We're going to get Ms.

[7] At this juncture of the hearing, the objectors' attorneys apparently believed that the trial court was also talking about calling in "Tony McClain." [R2.5]. Mr. McClain, of course, is the General Counsel of the Alabama State Bar.

> Gadson here. We're going to get Mr. Hollis here, and we're going to open it all up, all right. So when this case goes up to the next level, they'll have everything.

[R2.8]. The trial court again reminded the objectors' attorneys about the previous hearing:

> THE COURT: Then we got here at the hearing and found out that your law partner had been having a conversation with this woman on the telephone, which, all right, I found to violate, in my opinion, all right, the spirit of the attorney/client relationship and the Code of Professional Responsibility. I know you-all tried to come in here and say, well, Judge, he was just listening. And I think it's an affirmative duty on the lawyer to say, ma'am, I know you're represented by counsel. I cannot have any conversation with you. I'm going to open all that up, if that's what you want.
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> ***
>
> We're going to put everything in the record and then we'll let some appellate court sort it all out.

[R2.21-22].

The objectors' attorneys next argued that they should be allowed to cross-examine Ms. Gadson without having to explain their own unethical conduct because they did not intend to actually introduce the transcript of their interrogation into evidence. [R2.22-23]. The trial court correctly responded as follows:

> THE COURT: But you have gained something. You have gained an advantage. You have gained knowledge by talking to somebody who's been represented by another lawyer. And I'm going to put those circumstances on the record. . . . [I]t's in your mind and it's part of your strategy and it's part of the questions you're going to ask her because you learned this, all right, unethically, in my

> opinion. And we're going to put it all on the record. I'm going to issue an order for your senior partner, whatever he is, to be here at this hearing and we're going to put all of this on the record. . . .

[R2.22-23]. In response to the trial court's decision, Ms. Gadson's counsel offered to make her available as early as that very afternoon. [R2.26]. The trial court was very clear that "I'm going to put this on the record if you want to have a hearing, I will give you a hearing." [R2.35].

Faced with the prospect of having to explain their ethical transgressions under oath and on the record in this case, objectors' counsel were presented with a difficult conflict—either insist on obtaining Ms. Gadson's testimony as they had previously argued was critical for the objectors or instead protect themselves by foregoing such testimony.[8] As we now know, the objectors' counsel elected to protect themselves from any further scrutiny and declined the trial court's (and plaintiff's) offer to bring Ms. Gadson to court and make her available for questioning. [R2.33-36]. Thus, the objectors stated on the record that "I don't want to have a hearing" [R2.38], and requested that the trial court deny their post-judgment motions. [R2.33-36].

Thus, the objectors first urged the trial court to require Ms. Gadson to testify and to reconsider its rulings, but then abruptly changed course and, instead, asked the court to deny objectors' post-judgment motions and to *not* conduct a further evidentiary hearing to take testimony from Ms. Gadson. On appeal, however, the objectors maintain throughout their brief that the trial court abused its discretion by not allowing the objectors to cross-examine Ms. Gadson.

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[8] Indeed, in their written objections to the trial court, the objectors took the position that their "ability to cross-examine Vivian Gadson is crucial to the presentation of evidence in opposition to class certification." [C. 1196].

Under Alabama law, "'A party cannot win a reversal on an error that party has invited the trial court to commit.'" *Mobile Infirmary Medical Center v. Hodgen*, 884 So. 2d 801, 808 (Ala. 2003) (quoting *Neal v. Neal*, 856 So. 2d 766, 784 (Ala.2002); and citing *Liberty Nat'l Life Ins. Co. v. Beasley*, 466 So. 2d 935, 937 (Ala. 1985); *State Farm Mut. Auto. Ins. Co. v. Humphres*, 304 So. 2d 573, 577 (1974)). "'That doctrine [of invited error] provides that a party may not complain of error into which he has led the court.'" *Id.* (quoting *Ex parte King*, 643 So. 2d 1364, 1366 (Ala.1993)). Moreover, this Court "long ago held that a party cannot complain on appeal of a judgment entered at his request." *Kemp Motor Sales, Inc. v. Lawrenz*, 505 So. 2d 377, 380 (Ala. 1987) (citing *Champion v. Central of Georgia Ry.*, 51 So. 562 (1910)).

Because the objectors clearly had the opportunity to question Ms. Gadson under oath, but rejected it after it became clear that their attorneys' conduct would also be examined, they should not be heard to now complain—as they do throughout their brief to this Court—that Ms. Gadson did not testify before the trial court. Moreover, because the objectors' counsel inappropriately and intentionally contacted Ms. Gadson outside the presence of her counsel in violation of the Alabama Rules of Professional Conduct, the objectors' arguments to this Court are irreparably tainted by such contact and should not be considered by this Court.

3. *The Objectors' Conduct Violated The Alabama Rules Of Professional Conduct.*

While it is unfortunate to be forced into addressing this issue, there can be no doubt that the conduct of the objectors' attorneys in calling Ms. Gadson most certainly violated the Alabama Rules of Professional Conduct.[9] Rule 4.2 clearly

[9] Rule 8.3(a) of the Alabama Rules of Professional Conduct requires that an attorney who learns of a violation "shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such

prohibits a lawyer from communicating "with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Here, objectors' counsel knew full well that Ms. Gadson was represented by counsel when he telephoned her, interviewed her, and recorded the interview. Objectors' counsel was not authorized by any law to do so and was never given permission from Ms. Gadson's attorneys to engage in such tactics. There simply is no justification or excuse for such conduct.

Under the circumstances, the trial court would have been well within its discretion to refuse to require Ms. Gadson to be cross-examined by the objectors. *See generally Ex parte Lammon*, 688 So. 2d 836, 837-38 (Ala. Civ. App. 1996) (trial court did not abuse discretion in disqualifying attorney who violated Rule 4.2 by contacting a party represented by another attorney). Here, of course, the court offered to make Ms. Gadson available, but the objectors refused. Having done so, the objectors should not now be heard to complain.

[portions omitted]

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violation." Here, the record reflects that the trial court was directly made aware of and understood the violations at issue. "The term 'tribunal'. . . includes both courts and administrative proceedings." Alabama State Bar, Office of the General Counsel, Opinion No. 1993-06 (referring to Rule 3.3 of the Alabama Rules of Professional Conduct); *see also Garmon v. Alabama State Bar*, 570 So. 2d 633, 634 (Ala. 1990) (citing *The American Heritage Dictionary of the English Language* (1969); *Black's Law Dictionary* (5th ed. 1979)) ("'Tribunal' is variously defined in both lay and legal dictionaries as the seat of a court or the place where justice is administered.").